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No. 91-926

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

SCOTT F. LINDE,

Petitioner,

vs.

CARRIER COAL ENTERPRISES, INC. and BARBARA WARAKOMSKI, Court-Appointed Receiver for RAYMOND COLLIERY, CO., INC. and Its Subsidiaries,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT CARRIER COAL ENTERPRISES

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CARRIER COAL ENTERPRISES

NOW COMES respondent, Carrier Coal Enterprises ("Carrier") , by and through its counsel, Rosenn, Jenkins & Greenwald, and submits this Brief in Opposition to the Petition of Scott F. Linde ("Linde") for a Writ of Certiorari to the United

States Court of Appeals for the Third Circuit seeking review of the Opinion and Judgment of that Court issued on September 5, 1991. Carrier received Linde's Petition on December 5, 1991.

COUNTERSTATEMENT OF THE CASE

On May 20, 1988, Linde entered into an Agreement of Sale with the Receiver of Raymond Colliery Co., Inc. and its subsidiaries (the "Receiver"), by which the Receiver agreed to sell Raymond's interest in some 652 acres of land in Lackawanna County to Linde "or his assigns" for the purchase price of One Million Four Hundred Eighty-Three Thousand Dollars ($1,483,000) (the "Agreement of Sale") (App. 1a). Pursuant to the instructions of the District Court's Order of August 8, 1988, the purchase price contained in the Agreement of Sale was subject to a test through a competitive bidding process at a subsequent judicial sale and to final confirmation of the sale by the District Court. The judicial sale was scheduled for September 2, 1988.

On September 2, 1988, immediately prior to the conclusion of the scheduled time for bids to be received, Linde entered into an assignment with Carrier (the "Assignment") (App. 8a). Pursuant to the terms of the Assignment, Linde agreed to sell to Carrier "all of its right, title and interest in and to" the Agreement of Sale and any amendment thereto (App. 7a). Carrier agreed to pay Linde Two Hundred Thousand Dollars ($200,000), to be held in escrow, and to reconvey a certain tract of the subject property to Linde. After the time to receive any further bids had passed, Linde informed the Receiver of the Assignment to Carrier.

Rather than proceed with the sale pursuant to the Agreement of Sale and the Assignment, the Receiver, on November 12, 1988, filed a motion with the District Court entitled "Motion to Impose Remedies for Unlawful Interference with Court Directed Sale of Real Property" (App. 13a). The Receiver's motion was filed under

the same District Court docket number as the receivership action (80-1424) and Linde and Carrier were named in the motion. The Receiver maintained that Linde had breached the Agreement of Sale by entering into the Assignment with Carrier, that Linde did not have the right under the Agreement of Sale to assign its interests to a party with competitive interest in the subject real estate, and that the Assignment was collusive and an unlawful frustration of the bidding process (App. 13a-22a). Both Linde and Carrier opposed the Receiver's motion (App. 22a).

By Opinion and Order dated January 9, 1989, the District Court held that there was an ambiguity in the meaning of the phrase "Scott F. Linde, or his assigns" in the Agreement of Sale and ordered a hearing on the question of whether Linde and Carrier, by agreeing to the Assignment, had entered into a collusive agreement, which interfered with the competitive bidding process. A hearing was held on January 18, 1989.

By Memorandum dated January 24, 1989, the District Court found that the purpose of bidding was to test the adequacy of the purchase price contained in the Agreement of Sale and to generate higher bidding, and that the Assignment improperly stifled competitive bidding between Carrier and Linde and depressed the price to be paid to the Receiver (App. 40a). The District Court held that it need not decide whether there had been actual collusion between Carrier and Linde. Based upon its findings, the District Court entered an Order which modified the Agreement of Sale language "Linde or his assigns", thereby disapproving the Assignment, continued in full force and effect the Agreement of Sale, and directed the Receiver to reopen the bidding process subject to the same terms and conditions as set forth by its August 8, 1988 Order, so as to again test the adequacy of the purchase price agreed to in the Agreement of Sale.

On February 22, 1989, Linde filed a notice of appeal and

a Motion to Stay the second bid proceeding pending its appeal to the United States Court of Appeals for the Third Circuit (App. 49a, 52a). On March 7, 1989, the District Court denied Linde's request for a stay. Linde filed a notice of appeal from the District Court's March 7, 1989 Order (App. 53a).

Nowhere in his Appellant's Brief, nor in his subsequently filed Reply Brief, did Linde mention that it was his position that the Assignment was no longer valid or that he had made a second assignment to Lackawanna Land and Energy, Inc. ("Lackawanna"). Carrier filed a Brief before the Third Circuit Court of Appeals adopting Linde's position that he had the right under the Agreement of Sale to assign his interest to a competitive bidder.

On July 10, 1989, an oral argument was held before the Third Circuit Court of Appeals (Supp App. 1a).[1] At that time, Linde argued, as he had in his Appellant's Brief, that there was no basis in law or fact for the District Court's determination that the Assignment constituted an impermissible interference with the bidding process and that the District Court erred as a matter of law in holding that Linde's Assignment to a competitive bidder was not authorized by the "or his assigns" language in the Agreement of Sale. At no point during the oral argument did Linde state or imply that he no longer believed the Assignment to be valid, or that he had subsequently entered into an assignment with Lackawanna. Additionally, Linde allotted three (3) minutes of his oral argument time to Carrier, which Carrier used to explain its motives for entering into the Assignment (Supp. App. 9a-11a).

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1. Not surprisingly, Linde has chosen to omit from his Appendix the transcripts from the oral arguments held before the Third Circuit Court of Appeals on July 10, 1989 and March 6, 1991. Those transcripts are included in Carrier's Supplemental Appendix.

By Opinion and Order dated October 12, 1989, the Third Circuit Court of Appeals reversed the District Court's Order of January 24, 1989 and remanded the case to the District Court for further proceedings (App. 63a). In doing so, the Third Circuit Court of Appeals concluded that, absent collusion in the conduct of the sale, neither inadequacy of the purchase price nor the Assignment from Linde to Carrier was sufficient reason for the District Court "to set aside the assignment or to refuse final court approval of the sale." (App. 65a).

On October 25, 1989, Carrier filed a petition for panel rehearing requesting that the District Court be directed to confirm the sale to Carrier pursuant to the Assignment (App. 79a, 81a). Linde opposed Carrier's motion, arguing for the first time before any court that he believed that the Assignment was no longer valid due to Carrier's failure to file a notice of appeal from the District Court's January 24, 1989 Order, and also finally revealing to the court that he had entered into a subsequent assignment with Lackawanna (App. 87a). On December 21, 1989, the Third Circuit Court of Appeals denied Carrier's request for rehearing without opinion (App. 104a).

A hearing on the issue of collusion was conducted by the District Court in April, 1990. By Opinion and Order dated May 23, 1990, the District Court concluded that the facts presented showed no collusion between Carrier and Linde with respect to the conduct of the sale on September 2, 1988 and that the ruling of the Third Circuit Court of Appeals of October 12, 1989 precluded a finding that the Assignment, in itself, indicated collusive conduct. Accordingly, the District Court ruled that there was no collusion in the conduct of the sale which took place on September 2, 1988 and that the sale to Linde was "confirmed." The District Court directed the Receiver to prepare an "appropriate deed or deeds." (App. 105a).

On June 8, 1990, Carrier, believing that the appropriate deed or deeds would include deeds conveying the property to it pursuant to the Assignment, filed a Motion for Entry of Order Directing Receiver to Convey Real Estate Interests, requesting that the District Court compel specific performance by the Receiver and Linde of their obligations under the Agreement of Sale and the Assignment (App. 123a). Linde filed an Answer to the motion arguing again that Carrier could not compel Linde to honor the promises he made in the Assignment because Carrier had not filed a notice of appeal (App. 126a).

By Order dated August 15, 1990, the District Court denied Carrier's Motion for Entry of an Order Directing Receiver to Convey Real Estate Interests (App. 131a). The District Court's denial of Carrier's motion was not based upon the fact that Carrier did not file a notice of appeal, but instead upon its conclusion that "Carrier's Motion for us to direct the Receiver to convey directly to Carrier is not a proper vehicle for a determination of Carrier's rights, if any, against Linde." (App. 134a). Based upon this reasoning, the District Court denied Carrier's motion "without prejudice to Carrier's right to file an appropriate action against Linde *in the proper Court . . .* " (App. 134a) (emphasis in original). The District Court observed that "Carrier's rights under the Assignment may have been extinguished by our disapproval of the Assignment" and that "Carrier may well have been obliged to appeal from our order if it sought relief from our determination." (App. 133a).

Carrier filed a notice of appeal from the District Court's August 15, 1990 Order (App. 222a). Additionally, in an attempt to follow the District Court's instructions and bring the action in what the District Court obviously viewed as the "proper Court," Carrier promptly instituted in the Court of Common Pleas of Lackawanna County an action seeking specific performance by the Receiver and Linde under the Agreement of Sale and the

Assignment. The Receiver, of course, immediately removed that action to the District Court where it was docketed to Civil No. 3:CV-90-1731.

Carrier has filed a Motion for Summary Judgment in its favor with the District Court in Civil Action No. 90-1731. That motion has been fully briefed and is presently pending before the District Court.

With respect to Carrier's appeal of the District Court's August 15, 1990 Order, Carrier filed an Appellant's Brief and, later, a Reply Brief to the Appellee's Brief submitted by Linde.[2] On March 8, 1991, an oral argument was held before the same panel of the Third Circuit Court of Appeals which had heard the July 10, 1989 argument (Supp. App. 29a).

On September 5, 1991, the Third Circuit Court of Appeals issued an Opinion, holding that the only conclusion that could be drawn from its October 12, 1989 Opinion "is that the assignment to Carrier was still enforceable absent a showing of collusion." (App. 195a) (footnote omitted). Moreover, the Third Circuit Court of Appeals stated that it considered "Linde to have been less than forthright in attempting to deny that, at the time of the original appeal, both parties supported reversal of the District Court's invalidation of the sale because of the assignment." (App. 186a-187a). Based upon these findings, the Third Circuit Court of Appeals concluded that:

> Our reversal as to the district court's [January 24, 1989] order operated to both Linde and Carrier's benefit. Had Carrier filed an appeal, the

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2. Curiously, though he relies heavily upon it in the instant petition, Linde nowhere made mention of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), in the Brief he submitted to the Third Circuit Court of Appeals.

outcome would not have been different.

(App. 196a-197a). Due to conflicting interpretations of the language of the Assignment itself, however, the Third Circuit Court of Appeals remanded the action to the District Court with instructions to vacate its January 24, 1989 Order, and a recommendation that it "consolidate this case (Civil Action 80-1424) with Civil Action 90-1731 and render final decision on the case as a whole." (App. 197a).

On December 5, 1991, Carrier received Linde's Petition for Writ of Certiorari. This brief is filed in opposition thereto.

REASONS FOR DENYING THE WRIT

I.

LINDE'S PETITION IS REPLETE WITH MISSTATEMENTS AND OMISSIONS OF FACT AND LAW.

Rule 15.1 of the Rules of the Supreme Court provides that, in addition to other arguments for denying the petition, a Respondent's Brief in Opposition "should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Sup. Ct. R. 15.1. The purpose of addressing these misstatements is to avoid a situation in which the Court grants the petition "in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case." *Id.*

Linde's Petition contains numerous misstatements of both fact and law which result in a distortion of the questions which were truly at issue in this case on appeal. Moreover, Linde omits

from his Petition many significant legal and factual matters which affect his request that this Court exercise its discretionary jurisdiction.

Initially, although he includes it in his Appendix, Linde fails to specifically mention that the Third Circuit Court of Appeals issued a Certified Judgment in lieu of a formal mandate to the District Court on November 4, 1991 instructing the District Court to "vacate its January 24, 1989 Order" and recommending that it "consolidate this case (Civil Action 80-1424) with Civil Action 90-1731 and render final decision on the case as a whole." (App. 211a). On November 28, 1991, Carrier filed a motion with the District Court requesting that it follow the recommendation of the Third Circuit Court of Appeals by consolidating the two (2) cases and proceeding to render a final judgment on the case as a whole.

Although Linde has filed the instant Petition, he has made no application to this Court to stay proceedings in the District Court to consolidate and finally adjudicate this matter.[3] Of course, neither the filing of Linde's Petition nor this Court's granting of the Petition, in the absence of a properly requested and

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3. Linde filed a Motion to Stay the Issuance of the Certified Judgment with the Third Circuit Court of Appeals, but was unable or unwilling to post the One Million Six Hundred Thirty-One Thousand Three Hundred Dollar ($1,631,300) bond required by that court as a condition of such a stay. The Certified Judgment issued on the same day that Linde's request for reconsideration of the bond requirement was denied. On December 20, 1991, Linde filed a Motion to Stay with the District Court. Carrier plans to oppose this Motion arguing, *inter alia*, that the District Court is without jurisdiction to stay proceedings since the Third Circuit Court of Appeals has already issued its Certified Judgment. *See* 28 U.S.C. § 2101(f) (providing that stay may be granted only by "a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . ."); *see also, In re Stumes*, 681 F.2d 524, 525 (8th Cir. 1982) (only Court of Appeals or Supreme Court is empowered to stay execution of judgment of Court of Appeals).

adequately secured stay, operates as an impediment to the District Court's ability to act on the judgment of the Third Circuit Court of Appeals by consolidating the cases and rendering a final decision on the matter. *McCurry v. Allen*, 688 F.2d 581, 588 (8th Cir. 1982) (citing Stern and Gross, *Supreme Court Practice*, 847 (5th ed. 1978) for the proposition that neither the filing nor the granting of a petition for certiorari operates as a stay to either the execution of the judgment below or the issuance of the mandate below to a lower court). *See also*, 12 J. Moore, H. Bendix, B. Ringle, *Moore's Federal Practice*, ¶607.05 at p. 9-44, n. 3 (2d ed. 1991). Thus, because Linde has failed to properly request and adequately secure a stay of the District Court proceedings, this Court, in the unlikely event that it grants Linde's Petition, might very well be faced with a case in which the controversy presented to it has, as a practical matter, already been resolved by the District Court.

Linde's Petition also contains numerous statements of fact and law which are not based upon any documents of record or which attempt to create issues where he has previously admitted that no such issues exist. For example, Linde states that "Carrier had been presented with an almost identical draft contract to buy the Raymond Group interests that were the subject of the Linde Agreement of Sale for the same consideration Linde had agreed to pay" but that "Carrier refused to execute the proposed Agreement presented to it." Linde's Petition at 4 and 5 (footnote omitted). While it is undisputed that Carrier had engaged in negotiations with the Receiver to purchase the subject property, there is nothing in the record to substantiate Linde's above-referenced statement.

Even more troubling than Linde's willingness to make such statements without substantiation, is his apparent attempt to revive before this Court facts which he has conceded to the Third Circuit Court of Appeals do not create issues. Linde twice alludes to the

fact that on May 30, 1989 Carrier accepted return of the $200,000 held in escrow pursuant to the Assignment. *See* Linde's Petition at 9 and 16.

Linde fails to mention three (3) significant facts, however, in his repeated attempts to manufacture an issue out of Carrier's acceptance of the return of the $200,000. First, Linde fails to mention that when Carrier initially declined to accept the return of the $200,000, it informed Linde's co-counsel that "[since Linde] has appealed Judge Muir's decision concerning the legal propriety and enforceability of the Assignment Agreement, Carrier prefers to permit its payment to remain in escrow until the issues raised by [Linde] are resolved by the Third Circuit." (App. 161a). Next, Linde fails to mention that when Carrier did accept the return of the $200,000, it did so upon the express understanding of Linde's co-counsel that the return of the money was in no way a waiver of its rights under the Assignment should the District Court's Order of January 24, 1989 be reversed on appeal.[4] Finally, and most importantly, Linde deliberately omits the fact that during the oral argument held on March 6, 1991 before the Third Circuit Court of Appeals, Linde's counsel conceded that the return of the $200,000 was a "non-issue in the case." (Supp. App. 51a). Linde also fails to mention that the Third Circuit Court of Appeals in its September 5, 1991 Opinion, expressly found the return of the $200,000 to be a non-issue (App. 188a, n. 9).

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4. The existence of this express agreement is confirmed by the letter of December 14, 1990 to Thomas I. Vanaskie, Esquire from Allan Kluger, Esquire, both co-counsel for Linde, in which Attorney Kluger states "[m]y recollection is that [Carrier's counsel] contacted me to discuss the return of the $200,000.00 and said his client would accept the $200,000.00, but it was not to effect [sic] the agreement of September 2, 1988 between Carrier and Linde. *I agreed that the $200,000.00 refund would not effect this agreement.*" (App. 163a) (emphasis added). *See also* letters of Carrier's counsel (App. 168a, 171a-173a).

Linde also attempts to create an issue out of the December 21, 1989 summary denial of Carrier's request for rehearing by the Third Circuit Court of Appeals, despite having previously conceded that the ruling was without "precedential significance." (Supp. App. 49a). Indeed, in consecutive sentences of his Petition, Linde accomplishes the incredibly inconsistent feat of stating that "[w]hile the Third Circuit's denial of Carrier's rehearing petition certainly had no precedential import . . .", Linde was nevertheless ". . . plainly justified in believing that the denial of Carrier's rehearing petition meant that if Linde prevailed on the question of collusion, the litigation would be at an end and he would acquire the Raymond Group properties." Linde's Petition at 19. Carrier respectfully submits that it is impossible for any party to be "plainly justified" in believing that a ruling which summarily denies a petition for rehearing and admittedly is without "precedential import" means anything more than that rehearing has been denied.[5]

Linde's Petition makes further omissions and misstatements of fact and law which are tied more directly to his arguments in favor of his request that this Court exercise its discretionary jurisdiction. Accordingly, Carrier will address each of these remaining omissions or misstatements in the arguments in opposition to the granting of a Writ of Certiorari which are set forth below.

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5. Additionally, it must be noted that during the March 6, 1991 oral argument, the Third Circuit Court of Appeals gave a clear indication that the reasons behind its summary denial of Carrier's request for rehearing had more to do with the premature nature of the issue of whether Carrier was entitled to relief than with any argument for invalidity of the Assignment advanced by Linde (Supp. App. 48a-49a).

II.

LINDE'S PETITION UTTERLY FAILS TO DEMONSTRATE ANY SPECIAL AND IMPORTANT REASONS WHICH SUPPORT HIS REQUEST THAT THIS COURT EXERCISE ITS DISCRETIONARY JURISDICTION AND REVIEW THE OPINION AND JUDGMENT OF THE THIRD CIRCUIT COURT OF APPEALS.

Rule 10 of the Rules of the Supreme Court provides that one of the factors to be considered by this Court in determining whether the "special and important reasons" necessary to grant a Writ of Certiorari are present is whether the case presents a situation in which "[a] United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . " Sup. Ct. R. 10(a). In his Petition, Linde attempts, through misconstruction of the holding and rationale of the Third Circuit Court of Appeals, to create the appearance that its September 5, 1991 Opinion is in conflict with decisions of this Court and decisions of various courts of appeals. Moreover, Linde deliberately fails to recognize the factual and legal circumstances of the instant case, many of which were clearly delineated by the Third Circuit Court of Appeals, which render this case distinguishable from each of the decisions which he cites.

A. Linde's Statement of Questions Presented for Review Fails to Recognize the Rationale Underlying the Opinion of the Third Circuit Court of Appeals and States Issues Which Are Not Properly Before this Court for Review.

Linde's misconstruction of the September 5, 1991 Opinion of the Third Circuit Court of Appeals is initially revealed in his "Statement of Questions Presented for Review." Linde's first

question is posited in such a way as to leave the impression that the controlling issue in the instant case is one of which parties were before the court on the original appeal. *See* Linde's Petition at i. What Linde's question clearly ignores, of course, is that the instant case does not turn upon the question of which *parties* were before the court on appeal, pursuant to Rule 4 of the Federal Rules of Appellate Procedure, but instead upon the question of which *issues* were lawfully brought before the court for review pursuant to 28 U.S.C. § 2106. Though he has striven mightily to do so, Linde cannot get around the fact that no matter which party appealed the District Court's Order of January 24, 1989, the Third Circuit Court of Appeals could not reverse that Order without also reversing the District Court's "disapproval" of the Assignment. As the Third Circuit Court of Appeals stated in its September 5, 1991 Opinion:

> . . . [I]t was not unreasonable for Carrier to assume that it was impossible for Linde to appeal *only* the invalidation of the Agreement of Sale without reaching the question of the assignment — the issue of whether the district court had a valid reason for disapproving the Assignment was always present.

(App. 187a) (emphasis in original).

In light of this fact, it is clear that the first question presented by Linde to this Court states an issue that simply does not exist in this case. Regardless of whether Carrier filed a notice of appeal, the Third Circuit Court of Appeals could not reverse the Order of the District Court without also reversing the District Court's "disapproval" of the Assignment, and could not instruct the District Court to "confirm the sale" to Linde without approval

of the Assignment being included therein.[6]

The issue on the original appeal was whether the September 2, 1988 bidding process had been improperly stifled by the Assignment. Accordingly, the Third Circuit Court of Appeals had only two options upon review: (1) affirm the District Court's Order and subject the Agreement of Sale to another bidding process; or (2) remand the action to the District Court with instructions that, unless it found collusion between Linde and Carrier, it must confirm the Agreement of Sale as it stood at the conclusion of the September 2, 1988 bidding process — *i.e.*, with the Assignment. Thus, the instruction to the District Court to "confirm the sale to Linde" necessarily had to include approval of the Assignment. Instructing the District Court to direct the Receiver to convey the property to Linde alone was never an option for the Third Circuit Court of Appeals and was not a form of relief to which Linde was entitled under any scenario.

The second question posited by Linde also fails to recognize this fact. *See* Linde's Petition at i. It is, of course, erroneous to state that "the appellate court did not grant relief to [Carrier]" or that it "directed relief in favor of [Linde] alone," since, as explained above, and as stated in the Opinion of the Third Circuit Court of Appeals, "the only conclusion to be drawn from our [October 12, 1989] opinion is that the assignment to Carrier was still enforceable absent a showing of collusion." (App. 195a) (footnote omitted). Additionally, Linde, in stating his second question, once again attempts to attach some precedential

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6. Indeed, as the Third Circuit Court of Appeals stated:

> In the absence of collusion, the only conclusion that the District Court could reach was that the Agreement of Sale, *with its assignment provision*, was valid. (App. 195a, n. 11) (emphasis in original).

significance to the summary denial of Carrier's request for rehearing by the Third Circuit Court of Appeals, despite the fact that he has conceded that it has "no precedential import." Linde's Petition at 19.[7]

B. The Opinion of the Third Circuit Court of Appeals Is Not in Conflict with any Decision of this Court or of the Other Circuit Courts of Appeals.

Linde contends that the Opinion of the Third Circuit Court of Appeals is in "conflict with the decisions of this Court" and represents a "conflict among the courts of appeals." Linde's Petition at 12. Linde then cites three decisions of this Court, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); and *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937), as well as some later decisions of various Circuit Courts of Appeals, some of which have chosen to interpret this Court's holding in *Torres* broadly. *See* Linde's Petition at 12-25. What Linde fails — or perhaps refuses — to acknowledge, however, is that the instant case is legally and factually distinguishable from each of the decisions upon which he relies.

Initially, it must be reiterated that this case presents a question of whether an issue affecting all parties was properly before the court pursuant to § 2106, and whether the court could grant relief to Linde without addressing that issue. Thus, the question of whether Carrier filed a notice of appeal under Rule 4(a)(3) is irrelevant to the outcome of this matter and is clearly not a question which merits this Court's review.

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7. Linde's constant attempts to revisit issues which he has previously conceded have no bearing on this case — *e.g.*, the denial of rehearing, the return of the $200,000 — are not only a waste of this Court's valuable time, but are also a clear indication that he recognizes the weaknesses in his Rule 4(a)(3) argument and is desperately seeking a fall-back position.

By its Order of January 24, 1989, the District Court "disapproved" the Assignment and directed that the Agreement of Sale be subject to rebidding (App. 48a). Linde appealed, arguing in his Brief that he "plainly had the right to assign his interests under the Agreement of Sale" and that by entering into the Assignment he "merely exercised his right of assignment as provided for in the Agreement of Sale." At oral argument, Linde argued that the decision of the District Court deprived him of "the benefit of a freely negotiated assignment with Carrier Coal." (Supp. App. 4a).

On October 12, 1989, the Third Circuit Court of Appeals reversed the Order of the District Court, stating:

> We conclude that unless there was collusion, fraud, unfairness or mistake in the conduct of sale, . . . neither inadequacy of the purchase price nor the assignment is sufficient reason for the district court to *set aside the assignment* or to refuse final court approval of the sale.

(App. 65a) (emphasis added). The Third Circuit Court of Appeals remanded the action with instructions that the District Court should "either enter an order confirming the sale from the Receiver to [Linde] or alternatively . . . conduct a further hearing to determine if there was collusion in the conduct of the sale." (App. 73a).

On May 23, 1990, the District Court issued an Opinion in which it concluded that "[t]here was no collusion between Carrier and Linde in the conduct of the sale which took place on September 2, 1988." (App. 122a). This conclusion, when coupled with the Opinion of the Third Circuit Court of Appeals of October 12, 1989, necessarily decided that the Assignment was a valid exercise of Linde's power under the Agreement of Sale. The validity of

the Assignment having thus been determined, Carrier immediately took steps to enforce its rights under the Assignment.

Linde disingenuously argues that "the Third Circuit [Court of Appeals] has used Carrier's Appeal of the August 15, 1990 district court ruling to effectively modify the mandate it had issued on Linde's Appeal." Linde's Petition at 19. The Third Circuit Court of Appeals, however, did not "modify" anything in its Opinion of September 5, 1991. Instead, it merely explained to Linde an obvious fact which he has stubbornly refused to recognize since the October 12, 1989 ruling, namely, that the issue of whether the District Court had a valid reason for disapproving the Assignment was always before the court on appeal and that, on remand, the only conclusion the District Court could reach, absent a finding of collusion, was to confirm the sale to Linde and approve the Assignment to Carrier.

Thus, Linde's citations to Rule 4(a)(3) and to cases such as *Morley*, 300 U.S. 185, which prohibit a non-appealing party from "enlarging his own rights thereunder or lessening the rights of his adversary," have no application in the present case. Carrier has not sought to enlarge its own rights or lessen the rights of Linde by enforcing the Assignment. Instead, Carrier seeks only to enforce a right that it always had — *i.e.*, to enforce the Assignment once it had been determined as a matter of law that Linde's entering into the Assignment was a valid exercise of his power under the Agreement of Sale.

Accordingly, the argument that Carrier somehow lost its right to enforce the Assignment because it filed no notice of appeal is without merit. As the Third Circuit Court of Appeals noted:

> Our [October 12, 1989] reversal as to the district court's [January 24, 1989] order operated to both Linde and Carrier's benefit. Had Carrier

> filed an appeal the outcome would not have been different.

(App. 196a-197a). Indeed, apparently even Linde recognizes that the Third Circuit Court of Appeals' analysis on the original appeal "would not have differed one iota" whether Carrier was present in the appeal or not. Linde's Petition at 29 n. 7.

The presence or absence of a notice of appeal by Carrier is, therefore, not an issue which has any bearing on the outcome of this case or which merits review by this Court. The issue of the validity of the Assignment had to be decided by the Third Circuit Court of Appeals regardless of whether Carrier was a party to the original appeal.

It also must be noted that neither *Torres*, nor any other decision of this Court cited by Linde in his Petition, deals specifically with the requirements of Rule 4(a)(3), much less makes the filing of a notice of appeal thereunder a jurisdictional prerequisite. In *Torres*, this Court was presented only with the question of "whether a federal appellate court has jurisdiction over a party who was not specified in the notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c)." 487 U.S. at 313. Torres had been one of sixteen separate plaintiffs who had intervened in an employment discrimination suit. A notice of appeal from an order adverse to all sixteen separate plaintiffs was filed with the United States Court of Appeals for the Ninth Circuit. Torres' name, however, was omitted from the notice of appeal. On remand, the district court entered summary judgment against Torres based upon the fact that he failed to appeal. The Ninth Circuit Court of Appeals affirmed. *Id.* at 313-14.

In upholding the decision of the Ninth Circuit Court of Appeals, this Court held that "[t]he specificity requirement of Rule 3(c) is met only by some designation that gives fair notice

of the specific individual or entity seeking to appeal" and that meeting this requirement was a "jurisdictional prerequisite" to obtaining relief. *Id.* at 318. In language not necessary to its decision, the Court noted that a court "may not waive the jurisdictional requirements of Rules 3 and 4, . . ." *Id.* at 317.

Nowhere in *Torres*, however, does this Court indicate that the filing of a notice of appeal under 4(a)(3) is one of the "jurisdictional requirements" of Rule 4. Indeed, as the Third Circuit Court of Appeals concluded: "the Court's reference to the jurisdictional aspects of Rules 3 and 4 does not indicate that Rule 4(a)(3) is not properly applied as a rule of practice." (App. 193a). Later in its Opinion, in recognition of the fact that certain cases present situations in which the rights of the parties are so inextricably bound together that an appellate court can render no judgment that would be just without affecting the rights of parties who did not file notices of appeal, the Third Circuit Court of Appeals concluded that "the *Torres* holding is not readily transferable to the question of whether or not Rule 4(a)(3) is jurisdictional or a rule of practice." (App. 194a).

In the instant case, the Third Circuit Court of Appeals correctly recognized that "the presence or lack of a formal crossappeal will not always determine a court's ability to consider certain issues that are raised by parties to the appeal but also pertain to parties who are not formally participating in the appeal." (App. 193a). Indeed, Circuit Courts both before and since *Torres* have recognized that, in appropriate circumstances, the general rule that a cross-appeal must be filed in order for a party to obtain relief must yield when applying it would produce unnecessary complications or ambiguity or where the rights of the non-appealing party are so inextricably intertwined with those of the appealing party that it is impossible to grant relief to one party without granting relief to the other. *See e.g., Department of Defense, Office of Dependents Schools v. F.L.R.A.*, 879 F.2d

1220, 1224 n * (4th Cir. 1989) (recognizing that in appropriate circumstances the appellate court clearly has the power under § 2106 to grant relief favorable to non-party in the interests of justice); *Finkielstain v. Seidel,* 857 F.2d 893, 895 (2nd Cir. 1988) (recognizing that requirement of a cross-appeal is a rule of practice which is not jurisdictional and in appropriate circumstances may be disregarded); *see also, Scott University of Delaware,* 601 F.2d 76, 82-84 (3d Cir. 1979), *cert. denied,* 444 U.S. 931 (1979).

The Third Circuit Court of Appeals clearly found the existence of circumstances which made the filing of a cross-appeal by Carrier unnecessary when it concluded that:

> The case at hand presents just such a case where the disposition as to one party is inextricably intertwined with the interests of a non-appealing party so as to make it impossible to grant relief to one party without granting relief to the other . . . . [T]he relief we granted to Linde (the reinstatement of the sale) was premised on the fact that the assignment to Carrier was an improper basis upon which to void the sale . . . .

(App. 194a). There is nothing in *Torres* which indicates that the Third Circuit Court of Appeals acted beyond the scope of its jurisdiction in considering the validity of the Assignment on Linde's appeal. Indeed, if it were not able to consider the District Court's disapproval of the Assignment, it would not have been able to grant Linde the relief which he requested and the only relief to which he was entitled — *i.e.*, confirmation of the Agreement of Sale as it stood at the close of bidding on September 2, 1988.

To interpret *Torres* as limiting the ability of the courts of appeals to view the filing of a cross-appeal as a rule of practice

in appropriate circumstances such as those present in this case would result in the courts of appeals' being deprived of the power to fully adjudicate the issues properly before them pursuant to § 2106. Such a result clearly could not have been intended by this Court when it issued *Torres*.

In addition to the fact that *Torres* does not deal specifically with, and in fact never mentions, the filing of a cross-appeal under Rule 4(a)(3), it is also distinguishable from the present case on factual grounds. In *Torres*, the Court was dealing with sixteen *separate* plaintiffs, each with his or her own *separate* claim. In the present case, however, the Court is faced with two parties to one Assignment, the disapproval of which had to be an issue before the court of appeals no matter which party filed a notice of appeal.

This distinction also separates the present case from *Moitie*, 452 U.S. 394, as well as from each of the Circuit Court cases cited by Linde. *Moitie* involved seven parallel but *separate* civil anti-trust actions. *Id.* at 395. The District Court dismissed all seven complaints. Plaintiffs in five of the seven actions appealed. Plaintiffs in two actions, however, chose not to appeal and instead refiled the two actions in state court. The five actions appealed to the Ninth Circuit Court of Appeals were eventually reversed and remanded. The two state actions were removed to the District Court and were dismissed on the basis of *res judicata*. The plaintiffs in the two actions appealed. *Id.* at 395-396.

On appeal, the Ninth Circuit Court of Appeals reversed, concluding that "[b]ecause the instant dismissal rested on a case that has effectively been overruled, justice requires that the dismissal be reversed." *Moitie v. Federated Department Stores, Inc.*, 611 F.2d 1267, 1269-70 (9th Cir. 1980), *rev'd*, 452 U.S. 394 (1981). This Court reviewed the decision of the Ninth Circuit Court of Appeals.

The only question before this Court on review was "whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of *res judicata*." *Moitie*, 452 U.S. at 395. In reversing, this Court stated that it would not allow the two plaintiffs who had not appealed the first decision to be "the windfall beneficiaries of an appellate reversal procured by other *independent parties who have no interest in [their] case . . . .*" *Id.* at 400 (emphasis added).

The above-emphasized language clearly illustrates the distinction between *Moitie* and the present case. In *Moitie* the original appeal was taken by independent parties who had no interest in the outcome of the non-appealing parties' cases. In the present case, however, the original appeal was taken by Linde who, though an independent party, was required to and did argue that the Assignment to Carrier was a valid exercise of his rights under the Agreement of Sale and was wrongfully disapproved by the District Court. Thus, the original appeal in the present case did not involve the rights of parties who had no interest in each other's cases, but instead involved one issue — the validity of the Assignment — which had to be passed upon by the appellate court before it could grant relief to Linde.

Indeed, if any issue is *res judicata* in this case, it is that the Assignment is valid and, provided there is nothing in its own terms which precludes enforcement (a question presently before the District Court), enforceable. This issue is *res judicata* because the Third Circuit Court of Appeals has held that the Assignment may be found to be invalid only if there was collusion between Linde and Carrier, and the District Court has found that no such collusion occurred. Thus, *Moitie* is distinguishable from the present case.

The cases from the Circuit Courts relied upon by Linde are similarly distinguishable from the present case. In each, separate

parties with separate and distinct claims or liabilities failed to file a notice of appeal and were thus precluded from seeking relief after an adverse judgment had been reversed. In *Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376 (6th Cir. 1991), *cert. denied*, ____ U.S. ____, 1991 U.S. LEXIS 6895 (1991), ten separate trust funds brought an action concerning the failure of six different employers to make agreed-upon payments to the funds on behalf of their employees. *Id.* at 377-78. Because only one plaintiff was named in the notice of appeal and only one defendant in the notice of cross appeal, the court, applying *Torres*, held that only the interests of the named parties were before it on appeal. *Id.* at 380. Like *Torres*, however, *Michigan Carpenters* deals with *separate parties* with *separate and distinct claims*. As explained above, such cases simply do not apply to the present case.

Similarly, in *Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991), a case dealing only with Rule 3(c), the plaintiffs were a police union and five members of the police force. *Id.* at 107. In a notice of appeal from adverse judgments of the District Court, Trooper Pontarelli was the only appellant specifically named. *Id.* n. 2. Accordingly, the court applied *Torres* and held that only Pontarelli's interests were before it. *Id.* at 108-109. Once again, *Pontarelli* deals with separate parties with distinct interests and is therefore inapplicable to this case.

In *Piazza v. Aponte Roque*, 909 F.2d 35 (1st Cir. 1990), the court held that four defendants whose names were not contained in the notice of appeal of a fifth defendant could not benefit from the reversal of a punitive damage award which the fifth defendant obtained. The court, applying *Torres*, found that the reversal could not benefit the four other defendants. *Id.* at 38. As with *Pontarelli*, *Piazza* deals with separate parties with distinct liabilities or claims. Moreover, even the *Piazza* court recognized that the fact that a party files no notice of appeal is sometimes not a jurisdictional

bar to relief when it stated that "*[a]bsent circumstances not present here,* the inescapable consequence of failure to appeal a judgment within the time allowed is that the judgment becomes final." *Id.* at 39 (emphasis added).

Stockstill v. Petty Ray Geophysical, 888 F.2d 1493 (5th Cir. 1989) and *Young Radiator Co. v. Celotex Corp.,* 881 F.2d 1408 (7th Cir. 1989) are similarly distinguishable from the present case. *Stockstill* dealt with whether the court of appeals had jurisdiction over the distinct claim of a separate party who had filed no notice of appeal. The court, choosing to read *Torres* broadly, stated in language not necessary to its decision that "[i]t is questionable whether [cases holding that Rule 4(a)(3) can be read, in appropriate circumstances, as a rule of practice] remain good law in light of *Torres,*" but went on to hold that it was unnecessary to decide that issue since the "rule of practice" exception would not be applicable to the case before it. *Id.* at 1496-97.

Young Radiator also involved the distinct claim of a separate party who filed no notice of appeal. In *Young Radiator,* the defendant, Celotex, failed to appeal the dismissal of its Third Party Complaint even though the plaintiff had appealed the dismissal of its complaint against Celotex. The Seventh Circuit Court of Appeals reversed the dismissal of the plaintiff's complaint and Celotex sought to challenge the judgment entered for the Third Party defendants on its complaint. While the court held that, in light of *Torres,* a notice of appeal under 4(a)(3) on the part of Celotex was a jurisdictional prerequisite to granting relief, *id.* at 1415-17, *Young Radiator,* like the other authorities cited by Linde, is nevertheless distinguishable from the present case since it involves separate parties and distinct claims.

As the Third Circuit Court of Appeals recognized, the one decision which is indistinguishable from the instant case is *In re Barnett,* 124 F.2d 1005 (2d Cir. 1942) (App. 198a) (holding that

the reasoning in *Barnett* applies squarely to the instant case). *Barnett*, like the present case, presented a situation in which the rights of the parties are so inextricably intertwined that relief cannot be granted to the appealing party without enuring to the benefit of the non-appealing party.[8]

Linde makes a curious attempt to distinguish *Barnett* by arguing that it would have application here only if "it was the Receiver who sought to restrain enforcement of the Assignment." Linde's Petition at p. 27 n. 6. The Receiver, however, is precisely the party who sought to restrain enforcement of the Assignment in this case, arguing that it was not a valid exercise of Linde's rights under the Agreement of Sale. *See* Motion to Impose Remedies (App. 13a).

Linde further attempts to distinguish *Barnett* by pointing out several actions on his part which he contends should have put Carrier on notice that he no longer considered the Assignment valid. What Linde fails to recognize, however, is that regardless of the subjective states of mind of himself or Carrier with respect to the continuing validity of the Assignment, it was reasonable, and indeed correct, for Carrier to believe that the Third Circuit Court of Appeals could not decide Linde's appeal without deciding whether the District Court had properly "disapproved" the Assignment. Thus, the degree to which Linde may have misled Carrier as to his intentions with respect to the Assignment, while certainly probative of the manner in which Linde has chosen to conduct himself throughout this litigation, is of no moment.

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8. The knot that inextricably binds Linde and Carrier together is, of course, the Assignment. That knot cannot be undone either by the fact that Carrier filed no notice of appeal or by the fact that Linde has unilaterally determined that he will no longer live up to his obligations under the Assignment. Instead, the only force that can undo the knot, collusion between Carrier and Linde, has been specifically found by the District Court to be absent.

While the degree to which Carrier was misled by Linde may be of no moment, the same cannot be said for the way in which Linde misled the Third Circuit Court of Appeals. Nowhere in either of the briefs he submitted on the original appeal did Linde mention that he no longer believed the Assignment to be valid or that he had entered into a second assignment with Lackawanna.

Linde's deceptiveness before the Third Circuit Court of Appeals was not limited to his briefs, however. At the oral argument on July 10, 1989, Linde made no mention of the fact that he considered the Assignment unenforceable nor of the second assignment to Lackawanna. Indeed, Linde argued that he had been "deprived of the benefit of the freely negotiated assignment with Carrier." (Supp. App. 4a). Moreover, Linde ceded three minutes of his oral argument time to Carrier. Linde now offers the convenient explanation that he did so because he believed "that it was to his advantage to have a non-party argue in support of his position." Linde's Petition at 9. Curiously, however, despite being asked four times during the March 6, 1991 argument to explain why he allowed Carrier to argue before the court, Linde's counsel never offered this explanation (Supp. App. 43a-45a).

The view of the Third Circuit Court of Appeals concerning Linde's conduct is perhaps best illustrated in the following excerpt from the oral argument of March 6, 1991:

> THE COURT: [Linde] came up here and gave us the impression, I mean after all, the fly in the ointment allegedly was the assignment to Carrier, left us with the impression that if we found for [him] and there was no collusion, the deal would go through with Carrier, then found a loophole, we will keep it ourself and assign it to somebody else.

(Supp. App. 41a). Later, in its Opinion of September 5, 1991, the Third Circuit Court of Appeals, while refraining from making "a moral judgment on this tactical approach," noted its "incredulity" at Linde's "dramatic change in posture" from the first to the second appeal (App. 192a).

While Linde's tactical shifting of position is ultimately irrelevant, since he cannot escape the fact that the issue of the validity of the Assignment was always before the Third Circuit Court of Appeals, Carrier submits that it is disingenuous for Linde to now complain that he is the "unwitting dupe of Carrier's 'tactics' " or that an injustice has somehow been done to him because he has been unable to obtain relief to which he was never entitled.

Throughout this litigation, Linde has consistently shifted his stance to whichever position, no matter how inconsistent with his previous stance, gave him the best chance of gaining the property and avoiding the consequences of the Assignment which he voluntarily entered into. Such shifting is evident in the arguments he made — and did not make — in his two appearances before the Third Circuit Court of Appeals, as well as in his vain attempts to revive admittedly lifeless issues before this Court. This constant reinventing of his position did not entitle Linde to relief before the Third Circuit Court of Appeals and certainly does not entitle him to a Writ of Certiorari from this Court.

CONCLUSION

For all of the above-stated reasons, Linde's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — TRANSCRIPT OF PROCEEDINGS DATED JULY 10, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 89-5157, 89-5198

UNITED STATES OF AMERICA

vs.

TABOR COURT REALTY CORP., McCLELLAN REALTY CO., INC., PAGNOTTI ENTERPRISES, INC., LOREE ASSOCIATES, JAMES J. TEDESCO, HENRY VENTRE, LOUIS PAGNOTTI, II, RAYMOND COLLIERY CO., INC., BLUE COAL COMPANY, GILLAN COAL MINING CO., CARBONDALE COAL CO., POWDERLY CORPORATION, CLINTON FUEL SALES, INC., GREAT AMERICAN COAL CO., JOSEPH SOLFANELLI, Individually and as Trustee, GENERAL ELECTRIC CREDIT CORP., COMMONWEALTH OF PA. DEPT. OF MINES & MINERAL INDUSTRIES, et al.

Scott F. Linde, Party to Agreement of Sale
Appellant

[2] Oral Argument held before the THIRD CIRCUIT COURT OF APPEALS, on Monday, July 10, 1989, transcribed from a tape recording at the UNITED STATES DISTRICT COURT, Room 21400, Philadelphia, Pennsylvania 19106 on Friday, July 14, 1989 beginning at approximately 12:00 p.m., before Lisa DelCasale, Registered Professional Reporter and Approved Reporter for the United States District Court

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Appendix A

BEFORE:

HONORABLE EDWARD R. BECKER, Circuit Judge
HONORABLE A. LEON HIGGINBOTHAM, JR., Circuit Judge
HONORABLE RICHARD L. NYGAARD, Circuit Judge

APPEARANCES:

DILWORTH, PAXSON, KALISH & KAUFFMAN
BY: THOMAS I. VANASKIE, ESQUIRE

Counsel for Appellant

ROBERT SPIELMAN, ESQUIRE

Counsel for Carrier Coal Enterprises
a Pennsylvania Limited Partnership
(in support of Appellant)

THOMAS P. BRENNAN

Counsel for Thomas H. Kiley, Receiver
for Raymond Colliery Co., Inc., et al.

[3] MR. VANASKIE: May it please the Court, my name is Tom Vanaskie, and I represent the Appellant, Scott Linde, in this matter. With the Court's permission, I would like to reserve two minutes for rebuttal.

THE COURT: Sure.

THE COURT: Can you bear with us for just a moment.

(Pause.)

THE COURT: We're working out an issue of great fundamental importance. The lunchroom closes at 1:30, but we think we've got it under control.

(Discussion off the record).

THE COURT: Proceed.

MR. VANASKIE: Thank you, Your Honor. In addition, I should note I have ceded three minutes of my time to counsel for Carrier Coal, though an Appellee, has joined in our brief.

We are here before the Court today because we believe there is neither the basis in law nor in fact for the District [4] Court's determination that the assignment by Scott Linde to Carrier Coal for value of his interest under an agreement of sale constituted an impermissible interference with the bidding process to which that agreement of sale was made subject. I think it's important to realize what the District Court did not do or the approach that it did not take in this matter.

First of all, although it scheduled a hearing on the issue of collusion in the bidding process, it expressly declined to reach that issue and did not find that the parties had engaged in collusion.

Additionally, although the parties had briefed extensively the question of whether the assignment violated public policy in terms of its effect on the bidding process, the District Court did not address that issue. Instead, the District Court viewed the matter as being committed — in his words in his decision on our motion to stay, as committed to his sound [5] discretion citing in support

a District of Maryland Court decision. As a result of the District Court's decision, Linde has lost the bargain that he had with the receiver; he has been deprived of the benefit of the freely negotiated assignment with Carrier Coal.

The District Court's order says that if he was not the high bidder at a second sale, the Court would entertain a motion for the fair disposition of his deposit of $150,000 and that the receiver was not precluded from taking additional action against Linde or Carrier to recover any other shortfall the receiver thought occurred as a result of this conduct.

All of those consequences flow not from a determination that there was collusion, not from a determination that there was fraud, not even from a determination that there was a breach of contract.

THE COURT: Only from a determination of a judge fulfilling what he thought to be [6] his obligation under a statute of the United States in a circumstance where the — where Linde or anyone else in his circumstance who only had a conditional approval and who knew that the approval had to be made final by the Court, a judge who thought that he was protecting the creditors who are supposed to be protected in this circumstance, protecting the integrity of the bidding processes against the situation which snaps suddenly out of the picture a potential of not the most obvious bidder.

Why shouldn't we defer to the District Court in that situation?

MR. VANASKIE: The District — one of the interests that the District Court had a legitimate concern with is to obtain the highest amount of money for these properties in question. But

it had to balance against that interest, the expectation interest of Linde as a contractor who had conditional approval of an agreement that said he had a right to [7] assign it. This Court has said that the interest in obtaining the maximum amount available for a sale that is subject to a public auction cannot overcome the interest in finality in those sales. And I'm referring to the Stanley Engineering case.

THE COURT: That's a bankruptcy case.

MR. VANASKIE: It is a bankruptcy case, Your Honor, but it also involves the same principles, I submit. And that is whether or not the interest in obtaining the highest amount of money for a piece of property is sufficient to outweigh this strong policy in favor of finality and regularity in judicial sales.

THE COURT: But what's the need for finality when all you had in the beginning was a conditional approval which had to be — which was subject to the final approval of the Court?

MR. VANASKIE: The interest in finality, Your Honor, is that the conditional sale contemplated a public bidding process; the bidding process was [8] duly noticed; the bidding process went forward, and no party other than the bid submitted by virtue of that written contract came forward with a bid.

And at that point the bidding process was completed, and Linde had a right to expect that his bid would then be accepted unless there was evidence of fraud, unfairness, mistake or grossly inadequate consideration. And that's what Stanley Engineering held. And in that case, 17 and a half percent difference wasn't gross inadequacy.

And in this case to say that the exercise of the right of assignment was such exceptional circumstance as to warrant a refusal to confirm the sale doesn't fit, and it doesn't fit because Linde negotiated for that right to assign.

The testimony of the receiver was that the original agreement of sale prohibited an assignment without the express written consent of the receiver. If the receiver did not want an assignment prior to the bidding deadline, that restriction could have been inserted. It was not inserted. This matter was not approached by Linde behind closed doors in some smoke filled room but with advice of counsel and immediate advice and information given to the receiver. Under these circumstances where the bid made by Linde is $200,000 more than the highest appraisal, we submit there was not gross inadequacy, there was not evidence of fraud or other unconscionable conduct, and the District Court's interest in getting enough money isn't enough because his discretion was limited. And that is a matter that we submit to you, you have plenary review of, and that is to determine what were the bounds of his discretion.

THE COURT: Why was Linde — I mean Linde's obviously a very capable guy. Why was he able enough or clever enough to get in this buyer that the receiver — this was the logical buyer for the receiver. How come Linde was able to put the deal [10] together and the receiver couldn't?

MR. VANASKIE: That's an interesting question, Your Honor, and as things developed, Linde had negotiated and had purchased another parcel of land from the receiver. It was supposed to be 856 acres, but it turned out it was only 610 acres. They then entered into a negotiation process to make up the short fall. At the same time the receiver is negotiating with Carrier on

the deal that's before the Court today and took some of the property that Carrier had a leasehold interest in and gave it — and made it part of the other Linde transaction. At that point Carrier refused to go forward with its negotiations. It had an agreement in writing for $1,483,000, which it refused to go forward with. The receiver contacted Linde and said I'm going to lose my deal with Carrier because of this matter, and Linde's response was what if I take it. And the Carrier's response was that would work. And that's how the matter came [11] about. But when Linde sat down and looked at the agreement that was prepared by the receiver's counsel, he insisted upon the right of assignment, and that right of assignment gave it value. And if it was to be restricted, as the receiver suggests, to bringing in partners, that limitation could have been expressed. I would point out that the receiver has conceded that Linde could have assigned it for value after the bidding deadline.

THE COURT: Regardless.

THE COURT: The receiver got mad because Linde was making a profit by making a deal that he the receiver couldn't make but that Linde was clever enough to make.

MR. VANASKIE: That's exactly what happened, Your Honor. The receiver got mad. He struck a deal that he could not make, a better deal that he could not make. But it's important that it was not in the context of a public bid. It was a privately negotiated arm's length transaction, and the price would have a [12] different value depending upon the circumstances in which it is struck.

A public sale does not necessarily bring the highest price, and in this circumstance, it wasn't a public sale with parties of

equal bargaining position because Carrier had a vested interest in much of this property. It held long term leases with an option to purchase. I admit that Carrier was the logical buyer of the property, but by getting the right to assign it did — and exercising that, he did nothing wrong.

THE COURT: But should a — should a — should we accord as much right or as much expectation of finality in a private sale situation as we do, let's say, in the Stanley situation where you've got — where you've got a bankruptcy sale?

MR. VANASKIE: Yes, Your Honor, because in the private sale what has happened here is that the bid has been put out to the marketplace through a public bidding. No one shows except Carrier, and [13] Carrier, who has a right to protect its interests under the case law, enters into the assignment with Linde. Under those circumstances, yes, Your Honor.

THE COURT: But isn't there less reason to encourage reliance in the case of private sales because they're always subject to Court approval? I mean you're talking about this as though it were like a purely private situation, and ordinary private contracting arrangements, the whole essence of the law of contracts to give purchasers or whoever may be involved the benefit of their bargains, but does that same principle apply when you're dealing with sales subject to the approval of the Court?

MR. VANASKIE: Your Honor, I think the the same principle does apply where the District Court gives initial approval to the agreement and then sets in place, puts in place a mechanism to look and see whether there are other interested parties. And I think it does, Your Honor.

[14] THE COURT: What you're saying is that if Judge Muir wanted to hold a hearing and make a finding, that there was something collusive here, that that's what he should have done, but he didn't do that. And the finding here reeks of a sub silentio. I mean his ultimate conclusion reeks of a sub silentio conclusion, of collusion in the absence of a hearing on the issue and findings.

MR. VANASKIE: That's exactly right, Your Honor, and in the absence of evidence, that would support the sub silentio conclusion.

Thank you.

THE COURT: Thank you.

MR. SPIELMAN: My name is Robert Spielman. Our firm represents Carrier Coal Enterprises which actually is an Appellee, but we're joined in the brief of Scott Linde, the Appellant. I think there are two points that I'd like to make in the brief time that I've got. First of all, insofar as the integrity of the bidding [15] process is concerned, there was substantial difficulties that Carrier

THE COURT: Keep your voice up a little, Counsel.

MR. SPIELMAN: There were substantial difficulties that Carrier faced in this particular situation regarding the rules that were to be followed at the bidding process itself. On the one hand, you have in the transcript of the hearing before Judge Muir the receiver himself describing one process which would involve the submission of qualifying bids prior to 10:00 a.m. On the other hand, you have the receiver's counsel describing an entirely different process. Now, Judge Muir at the time of the hearing

said, well, I'm looking at this advertisement, and it seems to me that this is the process that should be followed. The problem that we face, though, was that first of all, we were not sure, we were uncertain as to what exactly was going to take place at the time that the bids were to be submitted, and second, [16] even under the scenario given by the receiver's counsel, that is, where written bids were to be submitted prior to 10:00 a.m., there remained considerable ground for doubt and confusion. We did not know, for example, whether a third party or whether Linde might walk in at the stroke of 10:00, put down a written bid, and under the rules, have that be the final bid. Carrier wanted an opportunity to meet any competing bid. It was uncertain whether under these unclear rules that could actually be done.

To a large extent, the assignment agreement that was entered into with Linde was an attempt by Carrier to lend some kind of certainty to a process which it clearly did not understand. You had asked previously how did Linde happen to get the agreement of sale executed with the receiver. That's a question that Carrier had at the time. They were involved in negotiations with the receiver; the next thing they knew, unknown to them, the [17] receiver had executed an agreement of sale with Linde. That's the situation in which all of this took place. We were confused, uncertain and concerned as to what exactly was going to take place, and that is why they agreed to enter into the assignment agreement, which the Court-approved agreement of sale in its own words specifically approved. The "or his assigns" was in an agreement that the Court itself had approved. We are aware that any document is ordinarily assignable by its own terms. We assume that the reason "or its assigns" had been inserted there was to lend specific emphasis to that fact. So the assignability of that agreement, as far as we were concerned, had been approved by the court.

THE COURT: Thank you very much.

MR. BRENNAN: If it please the Court, I am Thomas Brennan. I represent Thomas Kiley, the receiver for Raymond Colliery —

[18] THE COURT: How do you answer Mr. — Mr. Spielman, I thought, made some interesting points about the confusion on that fateful morning, which as a — how do you answer that?

MR. BRENNAN: Your Honor, I don't feel there was any confusion, but I will say this —

THE COURT: But you're not a witness, okay? You're here to answer his argument.

MR. BRENNAN: Your Honor, with all due respect, Mr. Spielman is not a witness either, and they called no witnesses whatsoever to talk about this confusion. They had the opportunity to present testimony to the extent they thought it was relevant at the hearing, to call the people from Carrier Coal to say this is why we did not bid, because of confusion, but they didn't. What you've heard today from Mr. Spielman is not in the record, except to the extent that there was my statement before the Court and the publication before the Court, but there is absolutely no [19] testimony from Mr. Linde or any of his representatives or anyone on his behalf or Carrier Coal or anyone on their behalf that that was the reason they didn't bid. I was quite frankly amazed when the brief came in reciting all of this information when it wasn't a part of the record.

In any event, how do I respond to it? I think I respond to

it the same way Judge Muir did at the argument where we had the motion to — where the Court was considering the motion to dismiss. Judge Muir said look at the publication. It's clear. There is no question as to how you present a bid. If you had presented a bid in accordance with this written publication, Mr. Brennan, what would your position be, and I said I wouldn't have any position except to accept that bid, and he said that's correct.

Now, that was in the argument for the motion to dismiss. Subsequently, when the motion to dismiss was denied, they had the opportunity to present their testimony. [20] They presented no testimony whatsoever.

THE COURT: What I'm trying to sort out is why you have to have testimony. It seems to me what the Appellant's arguing is one, we have a contract; the contract provides for assignment.

MR. BRENNAN: That's correct, Your Honor.

THE COURT: And we assign.

MR. BRENNAN: That's correct, Your Honor.

THE COURT: There's no finding of collusion, no finding of fraud. What is the basis for the trial judge to now repudiate that contract? Are judges so wise and omniscient that they can decide whether they like it or not, for any reason?

MR. BRENNAN: Your Honor, the contract was assignable, and I've never denied that. The contract was also subject to Court approval.

THE COURT: Yes, this is what I'm trying to focus on.

[20] MR. BRENNAN: Yes.

THE COURT: Subject to Court approval, you know, what — let me give you a hypothetical. The Court says oh, yes, well, Mr. Vanaskie, that's a good point, but you came into the Court wearing a red tie, and my whole position is unless it's a red and blue true university of Pennsylvania, yea, I'm going to turn that contract down because it's subject to my approval. If a judge did that —

MR. BRENNAN: He would clearly be wrong, Your Honor. I would clearly say it was an abuse of discretion, and —

THE COURT: Okay. Well, what I'm trying to find out from you is that what's the standard for abuse of discretion. Approval doesn't mean that you can just reject it (inaudible) got the right. What standard does Judge Muir have to reach in order to reject it.

MR. BRENNAN: Okay. I think it's ultimately a standard of fairness, Your Honor, if I can follow through on that.

[22] THE COURT: Okay.

MR. BRENNAN: And that is taken from the language of Stanley Engineering, which I recognize as a bankruptcy case, but I too have struggled with that in terms of preparing the case; how do I get the judge to say this is discretion or not discretion. What he said — the contract said yes, it's assignable, assignable, but the contract was also subject to Court approval.

Now, the testimony of the receiver was that it was understood

when the contract was entered into that that Court approval would only be given following a bid process to test the adequacy of the purchase price. That was understood. So the Court — so the receiver with the contract of sale goes to the Court and asks the Court to approve it. The Court does approve it with the understanding that the terms of it will be published and the terms would be subject to a bid process.

Now, what happened is just at the [23] final moment before the bids — the final moment for the closing of the bids, there was an assignment.

THE COURT: Now, now, hold on there. No one was precluded from bidding. I mean if someone else had come in and said oh my gosh, just the piece of land I wanted and I'll throw $3 million on it, then the judge could have turned down this one and accepted the $3 million. There was no preclusion of bidding, is there? Is this —

MR. BRENNAN: No. But, Your Honor, there are no two — this is a very limited type of tract. There are two people that have an interest in this, the very two people we would expect and would rationally conclude to be the bidders. It only takes two bidders for —

THE COURT: Well, why did you approve — why didn't you allow the contract to give to give a right of assignment? I mean, it seems to me that that if what you want to do is that you — you'd have to say "X" [24] Company, you can assign to anyone but "X." I mean if what you're concerned about is, let's say, suppose we've got someone who's going to purchase an automobile agency. And let's assume we're three major concerns and so General Motors — I mean Chrysler is up for

bids. They're in bankruptcy and you're worried about —

MR. BRENNAN: Specific ones.

THE COURT: — specific ones, and then what you do is you say well, you've got it, you can assign it to anyone but for General Motors. Because if General Motors comes in, they're going to have to pay more. And what the receiver — if the receiver is worried about this, the receiver should have said, look, you can assign this to anyone but — what's the name of the company?

MR. BRENNAN: Carrier Coal Enterprises.

THE COURT: Yes.

MR. BRENNAN: We didn't know it was so limited, obviously, Your Honor. We did [25] — as it turned out, they were the two bidders, but there are other Coal operators in the — that could have come in, and we wouldn't have known that. The history as to why "or his assigns" was added and the language prohibiting assignment was deleted is in the record. It was done with the understanding to give Mr. Linde the opportunity to come up with people to help him complete his bid, not to sell the contract. What I'm suggesting is that.

THE COURT: Well, that's what he did. He did come up with people —

MR. BRENNAN: No.

THE COURT: — to help him complete his bid for a $200,000 profit.

MR. BRENNAN: No. He sold the agreement of sale, Judge, and what I'm suggesting is that when you enter into an agreement, a contract, which was what this assignment was, an agreement of sale between two competitive interests, and the result of that is to — as Judge Muir found as a fact, was to frustrate the bid [26] process, which I believe the large body of law is that if agreement serves the purpose of frustrating the bid process, the very bid process which was established to test the — that the receiver was getting the appropriate value, if it frustrates that process, then the Court says the process wouldn't work for what it was intended for.

THE COURT: But that's because it was — I mean what your argument is pregnant with is that there was collusion. I mean you started — when you were answering Judge Higginbotham's question before, you talked about well, the only two logical bidders were taken out of it. What you're in essence saying and what it seems to me Judge Muir may have been saying sub silentio was that it was collusive, and yet he abjured any reliance on collusion, didn't hold a hearing — there is no evidence, there is no fact findings, why shouldn't we send this back, have a hearing and find out whether it was collusive, whether Linde and Carrier made some deal [27] that — that's against public policy or improper for some reason or other?

MR. BRENNAN: Okay. Your Honor, I don't think collusion has to be found. I think that what we have to find is that there was an agreement which frustrated the bid process.

THE COURT: What does that mean, "an agreement that frustrated the bid process"?

THE COURT: Yes.

MR. BRENNAN: I think what it meant —

THE COURT: Is that a new term of art?

MR. BRENNAN: No, it isn't, Your Honor.

THE COURT: No?

MR. BRENNAN: It is cited in the cases. I'm not that clever to come up with it quite that way —

THE COURT: Yes. Well, I thought that it was not a new term of art. Now, you give us — and in all of the cases where they've ever used an agreement to [27] frustrate the bid process, where there's a factual situation close to this one. which is the primary case which we've cited, it's an 1893 Pennsylvania Supreme Court case, which is cited on Page 17 of our brief —

THE COURT: What were the facts in this? How does that case, the Hayes case compare to this?

MR. BRENNAN: Your Honor, it was an agreement, and it was a secret agreement which two parties entered into, not to bid at an auction, with the idea that the one party would get the bid, would get the property and then he would divide it up with the other party. They agreed not to compete against one another.

THE COURT: Now, we don't have any findings here analogous to what was found in Hayes.

MR. BRENNAN: Your Honor, we do have a finding that the Court determined that the agreement aborted the true test of the — [29] aborted the true test of the bidding, and we do

have a finding, and both of these things there I'm going to mention are in the discussion section of Judge Muir's opinion. We do have the finding that the receiver was deprived of the bid from Carrier Coal Enterprises. They were both findings of fact to that effect.

I don't want to be unresponsive to you.

THE COURT: No. Incidentally, you're being responsive and maybe — I'm struggling because this is really sort of a new realm of law, it seems to me, what you're arguing. What — as I read the Hayes case, they have a secret agreement to refrain from bidding in order to prevent competition. It was not an assignment.

MR. BRENNAN: No. That —

THE COURT: Now, what you seem to be suggesting is that as a matter of law, any time you have an assignment that's the equivalent of a stipulation to refrain from bidding, it therefore is illegal. Isn't [30] that the ultimate logic of what you're —

MR. BRENNAN: I think if I could take a step back —

THE COURT: Yes.

MR. BRENNAN: — Hayes is an example of an agreement which had as its primary purpose the stifling of competition. I start off with Williston on contracts.

THE COURT: Well, that's what an assignment is, by definition. An assignment is saying look, you assign it to me and I'll get it now, and I don't have to worry about having to bid or purchase it from someone else.

Appendix A

MR. BRENNAN: Fine, Judge, but why should the receiver, why should the Court approve the sale at the price of $1,483,000 when it was understood all along that we didn't have to sell it for $1,483,000 unless and until there had been a bid process which established the adequacy of that purchase price.

THE COURT: The Carrier was entitled to bid. The Carrier might have bid.

[31] MR. BRENNAN: It's conceivable, Judge,the Carrier might have bid, but with Carrier having obviously the agreement in hand —

THE COURT: Well but they had —.

MR. BRENNAN: — it made the agreement —

THE COURT: They had to give up something for it. They may — they had to give Linde some other land. They might have got it on their own.

THE COURT: This is what is sort of odd about this case. If they had come in and had bid $1,683,000 —

MR. BRENNAN: Yes. They don't know what Linde would have done. And you see that —

THE COURT: And if Linde had done nothing, it would have been okay.

MR. BRENNAN: If Linde had done nothing, Carrier would have been okay. But the problem is what Carrier wanted to do was to make sure that they got it for a set price which was

acceptable to them. Linde [32] saying —

THE COURT: That's the law of assignment. I mean I've been out of the practice of law a long while, but I always thought that's why you take assignments.

MR. BRENNAN: Okay. Your Honor —

THE COURT: You take an assignment because you want all but a fixed position.

MR. BRENNAN: Okay. Your Honor, I'm not arguing the right to assign. What I'm saying is what has been assigned is a contract which is subject to Court approval, and that Court approval was not going to be given — was never to be given unless there was a fair bid process that established that the receiver was given the fair value.

THE COURT: Well, now you — in terms of fair value —

MR. BRENNAN: Yes.

THE COURT: — I don't know why fair value wasn't established by the appraisal, which was $200,000 lower than the bid.

MR. BRENNAN: Well, Your Honor, if [33] that was the reason, we would never have to go through the bid processes that we go through.

THE COURT: Why?

MR. BRENNAN: So we go through — we had —

THE COURT: How do you measure — I understand that point. How do you measure a fair bid process? If the fair bid process is tested solely by the presence or absence of collusion, then we have to send this back because there's no finding of collusion.

MR. BRENNAN: Okay.

THE COURT: Isn't that right?

MR. BRENNAN: Yes. If there has to be a finding of collusion, then I would agree with Your Honor.

THE COURT: Well, now what — as Judge Higginbotham has observed several times this morning, when we write, we write with precedential effect, and people who buy in Pennsylvania — well, anywhere in the Third Circuit under, what is it, 2006 [34] or whatever it is?

MR. BRENNAN: 2001.

THE COURT: 2001 of Title 28 in connection with what's it, judicial sales; is that the correct —

MR. BRENNAN: Yes, Your Honor.

THE COURT: Judicial sales are going to be bound by it. We've got to lay down some standards. What you want us to say is well, maybe you better tell me what you want us to say about what we say to judges and litigants about how you define a fair bid process. Is a fair bid process like the Chancellor's foot, you know, whatever the Judge's instinct (ph.) of justice is.? Does the fair bid process determine — is it a function of a set

number of bidders? Is it a function of — what's it a function of? What do we tell posterity.

MR. BRENNAN: Your Honor, I realize the light is red, but —

THE COURT: Now you've got all the time you want if you can answer this one.

MR. BRENNAN: I'll do my best.

[35] THE COURT: Yes.

MR. BRENNAN: A fair bid process is a process in which there hasn't been any agreement to depress the price to be paid.

THE COURT: But that's collusion, which is not what —

MR. BRENNAN: Well — which is maybe what Judge Muir found without calling it collusion.

THE COURT: Well, if he did, it's got to go back, because collusion was reserved, and he expressly says that he made no finding of collusion. Well, you know, I don't mean to derail you.

MR. BRENNAN: No, no, Judge, I understand you have to do —

THE COURT: Start again as to what your formulation.

MR. BRENNAN: I don't see why I have to say collusion. In in re: Hayes.

THE COURT: You don't have to. What I'm inviting you to do is tell us give us a way to write the the opinion for you.

MR. BRENNAN: In in re: Hayes there [36] was an agreement between two people. The agreement frustrated the bid process and reduced the price to pay. As I told Judge Muir in argument, the fact that it was secret really did matter. That's like saying it's okay to shoot you in the foot as long as I'm telling you you're being shot in the foot. The point is it's not an issue of collusion; it is whether the agreement frustrates the bid process and made the bid process which was to test the value on unfair process. This became an unfair process because two parties didn't stand toe to toe but each made an agreement with their own separate interests at stake, and because that frustrated a bid process, we don't have to approve that sale, but we order a new sale.

THE COURT: What do you think this will do to — in the future to people who want to rely on the judicial sale?

MR. BRENNAN: I think it will do great things if we approved it because I think what it's saying to people is we're [37] no longer going to have agreements outside of the Court, but we're going to have people come in and toe to toe test the true value, which is what the whole process was intended to do. And if it is a fair process and if it's over with, then yes, we'll confirm it.

And I also want to speak to —

THE COURT: Then what we should do then — then the rule that you want us to say is, the rule that you want us to lay down is that fair bidding in connection with the judicial sale cannot be one where there is an assignment to another potential bidder, whether it's collusion or not. Linde and Carrier may be pure as

the driven snow and it may be there avowed — or their intention in pectore to give half of the profits to the United Way of Lackawanna County. Maybe they're going to get into Heaven as a result of this, but what you want us to say is that you want us to construe 2001 to prohibit assignments of a — of an agreement in connection with a [38] judicial sale to a potential bidder. That would be a prophylactic rule, and you would win; isn't that right?

MR. BRENNAN: Well, I wouldn't want you to do that, necessarily.

THE COURT: Why not?

MR. BRENNAN: There are exceptions to the agreement, and it's called the joint venture exception, but in all the cases with the joint venture exception where parties get together to bid —

THE COURT: Except if there's a joint venture.

MR. BRENNAN: Except if there's the joint venture.

THE COURT: So what we would say then we would lay down a precedent that says the Court may disapprove any bid in connection with the judicial sale where — which contains an assignment to a potential competitor unless there's a joint venture. That's a perfectly good rule and you'd win; isn't that right?

THE COURT: You know, the question is [39] whether it makes sense.

MR. BRENNAN: Yes.

THE COURT: I mean, you know, somewhere along the line

it would be helpful if some of the things that we did made sense, and the rule which you are really suggesting will result in people who think they have a possibility of making an assignment conceivably not even making the original bid because you'd have precluded that, and you may very, very well end up in some situations, maybe even in this case where the property would be sold at a lesser figure than what the deal was here.

Now, that is part of the possibility.

THE COURT: Is that correct, or is what would happen is that everybody would be honest? You have a prophylactic rule, a —

MR. BRENNAN: No. We could have ended up losing money.

THE COURT: Yes. Of course.

MR. BRENNAN: But what I — I don't know how else to explain it, and I'm — to [40] the extent that I'm not representing Judge Muir's thought patterns properly, then I —

THE COURT: You have done an excellent job as counsel. What I really see as what you want to win this case is we'll flip a coin and I will say whether it's heads or tails, I will call and I will look at it, and if it goes my way, fine; if it's what I want, fine; if it doesn't, then I can negate it. I mean — and this is almost in the front (inaudible), a judge has unlimited power to call the shots, and what it reminds me of is this line of, you know — from Gilbert and Sullivan, the law is the perfect embodiment of everything that's excellent. It has no kind of fault or flaw and I and my lords embody the law. And that's what it seems to me you're asking. Am I wrong?

MR. BRENNAN: Your Honor, I'm going to disagree.

THE COURT: Okay. Fine, sure, sure.

MR. BRENNAN. And respectfully.

THE COURT: I understand. Well, [41] you've written an excellent brief. The Hayes case hasn't been cited recently, has it?

MR. BRENNAN: No.

THE COURT: Since this century. All right. Thank you very much, Counsel. We appreciate it.

THE COURT: Mr. Vanaskie, what's wrong with that rule which says that a judicial sale shall be disallowed if there's an assignment to a potential bidder?

MR. VANASKIE: I think there's several things wrong with that. Number one, I think it would discourage parties from getting involved —

THE COURT: Why?

MR. VANASKIE: — in the process. There would be no agreement. There would be no agreement for $1,483,000 if Linde did not have the right to assign it. There would have been no agreement with Carrier Coal at that figure.

THE COURT: Because the only people who might be willing to take it would be [42] people who, by definition, would be potential bidders.

MR. VANASKIE: That's exactly right, Your Honor. They would all be, by definition, potential bidders.

THE COURT: Because if they were going to take it and pay for it, there are people who might have been in there in first place.

MR. VANASKIE: And that rule, Your Honor, would not encourage fairness and honesty. It would encourage dishonesty by saying let's all get together and call ourselves joint ventures so we come within this rule. But here's our secret agreement to divvy up later.

THE COURT: If we want to get the best possible sale, we should encourage enterprising people like Linde to come in and bid.

MR. VANASKIE: We should encourage people — we should encourage receivers who enter into contracts, to follow through with their contracts and when they say that [43] they are to be assignable, recognize that assignment includes the possibility of an assignment prior to the bidding deadline. This contract specifically said it inures to the benefit of the assigns of Linde and that the receiver would use his best efforts to obtain approval.

And I would like to point out, there was one discussion about one exception, the joint venture exception, but there's another exception to these agreements that impact on bidding processes, and that is where a party has an interest in the land. And with the Court's indulgence, I would refer to Sections 1468 of Volume 6A Corbin on contracts, which is not cited in any of the briefs, and I apologize for that, but that says one who has an interest —

THE COURT: Judge Higginbotham and I went to Yale, and

we're delighted to hear you cite Corbin. The other side cited Williston, but we won't hold that against him.

[44] THE COURT: It indicated a weakness in their case, though.

(Laughter)

MR. VANASKIE: But if you look at that section, Your Honors, it specifically recognizes that one who has an interest can even agree not to bid. We didn't have an agreement not to bid here. And for those reasons — and my time is up now, but I wanted to say that there was nothing wrong, yet Linde has been branded a wrongdoer for exercising what his contractual rights gave him.

Thank you.

THE COURT: Thank you. We'd like counsel to order a transcript.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS DATED MARCH 6, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 90-5802

UNITED STATES OF AMERICA

vs.

TABOR COURT REALTY CORP.; RAYMOND COLLIERY CO., INC.; McCLELLAN REALTY CO., INC.; LACKAWANNA COUNTY; PAGNOTTI ENTERPRISES, INC.; LOREE ASSOCIATES; JAMES J. TEDESCO; HENRY VENTRE; LOUIS PAGNOTTI, II; BLUE COAL COMPANY; GILLAN COAL MINING CO.; CARBONDALE COAL CO.; MOFFATT PREMIUM ANTHRACITE; NORTHWEST MINING, INC.; MAPLE CITY COAL CO.; POWDERLY CORPORATION; CLINTON FUEL SALES, INC.; GREAT AMERICAN COAL CO.; JOSEPH SOLFANELLI, Individually and as trustee; GENERAL ELECTRIC CREDIT CORP.; COMM. OF PA., DEPT. OF MINES & MINERAL INDUSTRIES, DEPARTMENT OF ENVIRONMENTAL RESOURCES and DEPT. OF REVENUE; BOROUGH OF OLYPHANT; JOHN J. GILLEN; THOMAS J. GILLEN; ROBERT W. CLEVELAND & SONS, INC.; WILLIAM T. KIRCHOFF; JAY W. CLEVELAND; ROYAL E. CLEVELAND; CITY OF SCRANTON SEWER AUTHORITY; LACKAWANNA RIVER GLENEAGLES INVESTMENT CO., INC.; JEDDO HIGHLAND COAL CO.; OLYPHANT PREMIUM ANTRACITE, INC.; OLYPHANT ASSOCIATES; MININOU CORPORATION; GLEN NAN, INC.; GILCO, INC.; JAY W. CLEVELAND, as Administrator of the Estate of ROYAL E. CLEVELAND, CARRIER COAL ENTERPRISES ("Carrier"),

Appellant

Appendix B

Philadelphia, Pennsylvania
March 3, 1991 - ARGUMENT

[2] BEFORE:
HON. EDWARD R. BECKER
HON. RICHARD L. NYGAARD
HON. A. LEON HIGGINBOTHAM, JR.

APPEARANCES:
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Counsel for Appellee Scott F. Linde

[3] THE COURT: Very well , we have Mr. Whelley for the appellant, and Mr. Vanaskie and Mr. Brennan.

Appendix B

Are you both going to argue?

MR. VANASKIE: No, sir. I only will argue.

THE COURT: Yes. That's what I would have assumed.

Very well, we will hear from you, Mr. Whelley.

MR. WHELLEY: Thank you very much, your Honor.

THE COURT: We have you all over again. It is a coincidence but a felicitous one that you come back before the very same panel that sent you back to the District Court in the first place and ruled on the petition for panel re-hearing.

MR. WHELLEY: Although I was not privileged to argue for Carrier the first time up, your Honor, I was also pleased because of the benefit of this panel's knowledge of what preceded before.

THE COURT: Not only the panel's [4] knowledge but our ability to interpret with authority our prior ruling on the petition for panel re-hearing.

MR. WHELLEY: Yes, your Honor.

If I may, your Honor, start out by reminding the Court of a situation that Abraham Lincoln found himself in the Circuit Court in Illinois, when on a Monday morning, he argued rather strongly for a position in favor of a party that he was representing and prevailed. He found himself later that week before that circuit judge making an argument for the client, the effect of which was exactly the opposite. When the judge confronted him with his

elocution of the previous Monday, Abe Lincoln is reported to have said, your Honor, I'm not sure I was correct on Monday but I'm sure I'm correct here on Wednesday.

I suggest to the Court, that's the position that my friend and colleague, Mr. Vanaskie of Dilworth, Paxson is taking, that their position before this Court, the first time this came up, I think was clear, that they were concerned about the fact that they could not assign the property to Carrier. We believe that [5] was the intent of the decision of the Court in its first decision.

The matter was returned to Judge Muir and we are back on what we believe are two ancillary issues; the ancillary issue, one, whether the failure of Carrier to be a party appellant means that they cannot now seek the enforceability of the assignmment below because they — cannot refute the decision of the District Court in finding that the assignment was null and void.

Secondly, the issue of waiver, which this Court has requested supplemental documentation. On its face, we believe on its face there is no waiver of the assignment right. I think, what is interesting to observe, if we look at the second point first, that in the answer to the complaint filed by Linde to the specific performance action initially filed in the Court of Common Pleas of Lackawanna County and now before Judge Muir on a petition to remove it, they do not raise either the statute of frauds defense or the defense of waiver; it is not attributed in any way to the affirmative defenses or in any of the [6] extended language in the general denials made to the allegations.

I think this is a late founded objection and you see it, because of letters that I have first seen yesterday, when I reviewed the supplemental documents supplied by Mr. Vanaskie, two letters

by his client raising some questions about the effect of the return of the $200,000 but those issues never being communicated either to Mr. Kluger, his counsel or my partner or partners, Mr. Ufberg or Speilman, who were involved in this matter, in the exchange of correspondence earlier.

Your Honors, with respect to the issue of whether we have a right to challenge the assignment below, I think it turns on two issues, one —

THE COURT: Where is the proceeding before Judge Muir up to right now, as we speak?

MR. WHELLEY: There are two proceedings in two separate actions. Right now we are appealing a decision of Judge Muir on — saying essentially our procedure of seeking to compel the enforcement of the assignment by motion [7] was inappropriate.

MR. WHELLEY: The other case is a separate action started in the Court of Common Pleas of Lackawanna County on his admonition you used the wrong procedure and action started for specific performance of the assignment agreement. It was removed because of the jurisdiction of the Court over Mr. Kiley the receiver. And, we felt he was a party for adjudication, had to be included, so that it ended up in Judge Muir's Court; a motion to dismiss was made by the defendants, that was denied by Judge Muir, finding that you had not yet made clear the issue of Barnett, whether or not we could challenge the appeal and was deferring to you.

Secondly, that the assignment, paragraph four could arbuably be solely for the benefit of Carrier, and therefore, no waiver limit.

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THE COURT: You are talking about his opinion of January 10, 1991?

MR. WHELLEY: That is right, your Honor.

THE COURT: I hate to raise the issue of mootness because all of you have spent so much [8] time and energy on this.

MR. WHELLEY: I'm prepared for that, your Honor.

THE COURT: The appeal which is before us, was a question as to whether Judge Muir should give you the relief you requested, exclusive of, prior to the time you filed your suit in Lackawanna County, am I correct?

MR. WHELLEY: I think that's fair although there were simultaneous acts by us, the appeal here and the suit in Lackawanna County. We took both courses, not sure if it was appropriate to appeal his order or follow his admonition.

THE COURT: Fine. Now it seems to me, looking at Judge Muir's opinion of January 10, he says that these pleadings raise the issue and he denies what I presume may have been some motion to dismiss, but as I read his January 10, 1991 pleading, this is the record and that you have Mr. Linde, the receiver and you; there are three major parties, am I correct?

MR. WHELLEY: Yes, your Honor.

THE COURT: It's the same land involved and the same assignment agreement?

[9] MR. WHELLEY: Yes, your Honor.

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THE COURT: Now, why should not this be decided now that we know that in Judge Muir's mind, the proper pleading is before him, and that we look upon your appeal as moot because you were concerned about the fact that the District Court wasn't going to decide it and see what the District Court Judge does?

MR. WHELLEY: I appreciate the concern of the Appellate Court to allow the opportunity for the District Judge to rule. Except on page five of his decision denying the opportunity to dismiss, which is the addendum number to reply brief of the appellant was provided because of subsequent procedural events.

THE COURT: He says we have the authority.

MR. WHELLEY: He goes on to say, however, the Court of Appeals did not do so on appeal and Carrier provides no authority for its argument that the District Court may do so now.

The problem, we have, your Honor, we think the law is very clear, that In Re Barnett controls, that's what you intended in the first [10] appeal. We are now stuck with his concern.

THE COURT: Counsel, I have this underlined in green, so when you get a green underlining, when it is green I know from experience, yes.

MR. WHELLEY: I should have read from the beginning, where your green is which is the sentence before the one I read already for the record, because that is also helpful.

THE COURT: All right. The Court of appeals possesses the authority to grant relief.

MR. WHELLEY: Despite the cross appeal.

THE COURT: Okay.

Now, it seems to me, that the most which we should do in this case, is to say, that the District Court does have the authority to provide to Carrier the relief it seeks, if Carrier has met its appropriate burden of proof.

MR. WHELLEY: On the Barnett issue, your Honor, or on the issues with respect to the motion for specific performance or the complaint for specific performance?

THE COURT: On specific performance.

[11] MR. WHELLEY: Your Honor, I would be happy to have at least that relief, provided this Court made one thing clear, that the fact that Carrier did not cross appeal is not a bar to recovery.

THE COURT: Okay.

MR. WHELLEY: If I may go one step further, your Honor.

I know judicial economy is very important for this Court, although I'm not considering it a waste of time, I'm considering it an opportunity to try to resolve some problems together.

The Court by separate order has requested certain documentation to be presented before it. It appears, although I cannot read the mind of the Court or the Clerk of this Court, I think the purpose is to find out whether there is any factual basis for the late presentment of the waiver position by Linde.

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Based upon that record, which but for the letters that Mr. Linde sent to his counsel, which will be opposed as not having ever been communicated to us, will probably not make it in [12] the record of the trial below, if there is one, because there is pending a motion for summary judgment on the documentations before you, except the two letters from Mr. Linde. My concern is we will be back here.

THE COURT: Isn't that, Mr. Whelley, exactly what should happen? Let me suggest a variation on the theme, instead of dismissing the appeal for mootness, why don't we just stay this appeal, hold on to it, retain jurisdiction of it, until Judge Muir decides what's before him and further provide that any appeal from that Order should go to this panel, and then we have everything there. Talk about spinning wheels.

MR. WHELLEY: If your Honor please, the In Re Barnett problem, if Judge Muir knows you have no concerns about Carrier not cross appealing because the issues were all presented before the Court, and we have the right to challenge or to enforce the assignment below, that would save it coming back again.

If Judge Muir, that has essentially said in his motion to dismiss. I don't known I need direction from the Third Circuit, we at least [13] should give Judge Muir that direction on that issue.

I think you should go one step further.

THE COURT: Why do we have to commit ourselves, we are not handholders for the District Court, what the District Court does, it seems to me, when it is faced with this kind of situation, it posits two alternatives, decide it both ways, make alternate findings or an alternate conclusion of law. And, then it comes

up and we have the whole case.

MR. WHELLEY: Except that we will be up then on the issue that has been fully briefed and argued appropriately before the Court now because the Judge found, as a matter of his Order below, we could not prevail because of the In Re Barnett problem. I use that, of course, because of the precedent of this Court. That that the cross appeal was not taken, but he raises it in a kind of round about way.

THE COURT: He found the condition waived, as it were. He found ultimately that didn't make any difference.

MR. WHELLEY: I don't know he decided [14] that, your Honor, I wished he did.

THE COURT: That's what it seemed like to me.

MR. WHELLEY: If we have an order of the Court to that effect, it would be helpful; he dances around the subject, I'm afraid.

THE COURT: As I understand it, from your position, you don't want Judge Muir to have the horrible burden of trying to figure out what the Court of Appeals was thinking when we can tell him what we are thinking and, therefore, you want us to resolve that issue without getting into the question of specific performance?

MR. WHELLEY: We would ask this Court to decide the whole issue. We believe the record — we are prepared for that. We may have created our own Hobson's choice.

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THE COURT: The only way any rational lawyer could have gone go up to the Court of Appeals and go to the state court.

MR. WHELLEY: Thank you, your Honor.

THE COURT: If you had gone up to the Court of Appeals, the other side could have said you should have gone to the state court. If you [15] went to the state court, they would have said you should have appealed. No lawyer should be in the position of the adversary being able to play the shell and pea game because you put the pea in the wrong place.

MR. WHELLEY: I think, your Honor, what's before the Court right now is the ability then to resolve the entire matter without the need — I think it is an issue for summary judgment, I think based upon the record, this Court could exercise its jurisdiction and decide the issue as a matter of law; all the information is before you, we submit it would support a motion for summary judgment or ultimate verdict in favor of Carrier. There's really no reason, it seems at this stage to go through that process, because we were careful.

You can take jurisdiction, look at the documents provided, they were provided for all parties, it is consistent with the interpretation of the original decision that the assignment be enforced.

THE COURT: I tell you where I think the finding gap may be.

[16] What is the legal significance of the return of the $200,000 plus interest, was that, as a matter of law, a relinquishment of Carrier's rights or was it because of correspondence that had occurred between counsel, not a relinquishment. You are in the

same position as you would have been if you left the $200,000 here.

I think, that's a gap for a fact finder, which may be called fact finding that you are asking us to decide. Why am I wrong on that?

MR. WHELLEY: I think you are right on the analysis except the problem I raised at the outset, they have not raised a defense of waiver, they have not raised a defense of statute of limitations; that we have filed a motion for summary judgment on the record before the Court.

There is no record before the Court on these issues.

And, I submit to you, there will be uncontroverted testimony because notwithstanding the two letters from Mr. Linde to his counsel, those — no representation those were ever provided to the other side, that there was some condition on the condition.

You have my partner, Mr. Ufberg, then saying we will take the money back but Mr. Kluger, we understand, there is no waiver in this case and there is an affidavit of my partner Mr. Ufberg to that effect. At the request of Mr. Vanaskie, Mr. Linde's counsel, Mr. Kluger acting, I don't know which, you have it or not, but he was asked to say, what did you do and mean, when you returned the money? He wrote Mr. Vanaskie and said I meant not to affect the agreement.

Now the problem is —

THE COURT: You want us to thrash that all out?

MR. WHELLEY: No, your Honor, I don't think there is

anything to thrash out.

I think if you look at the documents you will see there was never any intention between the parties for a waiver. Now, we could ask Judge Muir to make a factual finding but since he would be sitting as the trier of fact, there will be a review of his factual findings, subject to this court's standard, and we will be right back here.

We will be back here on three issues, a [18] grant of motion for summary judgment, a denial of motion for summary judgment, and at least on verdict by Judge Muir against Carrier, maybe on a verdict of Judge Muir against Linde.

THE COURT: I take it on the ultimate merits, that it is your position that Linde double crossed you?

MR. WHELLEY: I think that's a fair characterization, yes, your Honor. I'm suggesting that they found a little loophole, something that may be colorable.

THE COURT: They came up here and gave us the impression, I mean after all, the fly in the ointment allegedly was the assignment to Carrier, left us with the impression that if we found for them and there was no collusion, the deal would go through with Carrier, then found a loophole, we will keep it ourself and assign it to somebody else.

MR. WHELLEY: That's our view.

THE COURT: They did more than that. They allowed you to argue before this Court supporting the assignment.

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MR. WHELLEY: Thank you, your Honor, [19] that's correct.

THE COURT: I mean, that, I mean, how were we mislead. I want to tell you I was absolutely shocked when a lawyer allows you, the assignee to argue before us on his time, supporting that argument, and then later for us to be told, sure we let them argue before the Court, arguing for the assignee, so he could get his $200,000. And, now, they say it is no deal, that was shocking to me.

MR. WHELLEY: Thank you very much, your Honor's.

THE COURT: Mr. Vanaskie, before you start, let me say that I share Judge Higginbotham's view, you may have a correct legal position, you may even have a correct moral position, but it sure doesn't appear on what I know about this case up to now.

MR. VANASKIE: I think I should begin with the rationale for permitting Mr. Spielman at the last time this matter was before this Court to argue.

At that time. I was requested to cede time to Mr. Speilman. At that time that we agreed [20] to cede time to Mr. Speilman, our position had been expressed to Carrier repeatedly that we considered the assignment to be no longer binding upon us.

We had made that position clear on March 15 of 1989, when we wrote, requesting that the escrowed funds be released. Significantly, the appeal period had not yet expired even from the January 24 order since there was a 60 day appeal period here.

We argued to this Court in a motion to stay the conducting

of a second judicial sale on April 4; again within which the time an appeal could be taken, that we wanted a stay to protect our rights in the agreement of sale and not the assignment.

We made an assignment to a second party, to Lackawanna Land and Energy of which Mr. Linde is only one, but indeed a principal shareholder, but only one shareholder.

THE COURT: He is president, isn't he?

MR. VANASKIE: He is vice president of that company, sir.

We made that assignment on April 28, [21] Carrier Coal was aware of that. We appeared at judicial sale, conducted on May 26. We read a statement, at which we said the appeal was taken with the intent to protect our interests.

On May 31, we filed an action for specific performance of the agreement of sale, not of the assignment.

The other side attempted to intervene in that action for specific performance.

We objected, on June 26 of —

THE COURT: Taking all of that in the record, why did you let them argue a case before us, when it was your view that they didn't have a valid assignment? Why would you take up our time?

Don't you think when I saw them argue, and to see you almost like brothers, hand in hand, that I assumed that the person who was arguing before us, was not the beneficiary of the assignment? What should I have voted?

What was your motive?

MR. VANASKIE: My motive was as follows: The Order of Judge Muir not only disapproved of the assignment, it subjected Linde and also Carrier to possible action.

[22] THE COURT: Why didn't you argue it before us without asking Carrier to appear?

MR. VANASKIE: I did not ask Carrier to appear.

THE COURT: Why did you let them appear? You were the one and you were the only one who had the authority to make the decision. If someone said I want to argue, you don't have to say — you know, I read Dale Carnegie, and I believe that everyone should be friends.

You go on and take four minutes of my time. You didn't make that kind of decision.

You could have said, no to them. If you said no to them, we would have gotten a different signal, the way in which the excellent opinion was written by judge Nygaard. You didn't do that.

You let them come up and argue.

MR. VANASKIE: Yes, your Honor, obviously I did let them come up and argue. Under the circumstances, I viewed it as the appropriate thing to do.

I did not view it as an indication I was misleading the Court. I don't think the Court's results should have differed, if we were

arguing [23] back to you in July of 1989.

THE COURT: Why would you get them to argue before us, if you felt that they weren't the assignee. They have lots of things to do in Wilkes Barre, they don't have to come down here to argue a case when they are not the assignee.

MR. VANASKIE: I missed the first part of your question. We didn't ask them to appear here to argue. We didn't ask them to submit a brief in support of our position.

THE COURT: You allowed them.

MR. VANASKIE: Yes, sir, you are right.

THE COURT: I don't say every time, when I see an allocation of time, 15 minutes to so and so has three minutes, so and so has 12, I assume that there is an agreement. And, particularly when the person is not an appellant and you allow them.

MR. VANASKIE: Your Honor, even at that time, the fact that Carrier made an argument with respect to the assignment did not mean that they, themselves, would intend to honor the assignment.

You have asked whether Mr. Whelley feels [24] his clients were double crossed. I think it goes the other way. Mr. Whelley's clients tried to hedge their bets. Mr. Whelley's clients would have liked to have had the option of deciding whether or not they are going to comply with the assignment; that way, if they do not appeal and the notice of appeal signals their intent.

THE COURT: Do you think they were that devious and

sophisticated, Mr. Vanaskie?

MR. VANASKIE: I think, sir, that they wanted to hedge their bets. They had an order.

THE COURT: There is nothing that's immoral about hedging their bet.

What they did was they said, look, the sale is going on, and we will take 10 percent more because if we lose in your case we will win here.

If this sale we bid on is not valid because the Court of Appeals reverses, we will have won there.

Now, there's nothing slimy about that.

MR. VANASKIE: Now, when I say hedge their bets, your Honors. they are saying that the condition was a unilateral one, that they could enforce or one that they could waive. They could [25] make a decision, based upon how events came out, whether or not they would continue to abide by the assignment or not.

Linde, in arguing the appeal, did not have the ability to go back and then demand specific performance or would be confronted with the argument, wait a second, we did not secure District Court approval of the assignment. We did not appeal. And, Mr. Whelley has raised the Barnett issue, I think the issue is properly before the Court, but I think the issue before the Court is jurisdictional in nature.

Did the failure to appeal an Order that disapproved the assignment, where the assignment specified as a condition necessary

Court approval preclude Carrier from obtaining any relief?

I would cite to the Court the Supreme Court's decision in Torres versus the Oakland Scavenger Company, a case that is now being recognized as putting the gloss on Barnett.

THE COURT: And, which we have on two or three occasions construed very narrowly. Recently I did in Paoli, in three or four cases. [26] I mean there was a case, I mean this was a case, the notice of appeal incorporated by reference the caption, didn't it?

MR. VANASKIE: The Torres case, your Honor?

THE COURT: No. This case.

MR. VANASKIE: Would have noticed the caption, yes, sir.

But, there's only one appealing party, Scott Linde. The Torres case involved inadvertent failure to designate one of 16 plaintiffs. And, it was deemed to be a jurisdictional defect.

I did understand that it has been applied liberally by this Court, but the issue becomes one of jurisdictional dimension.

THE COURT: We will examine our own jurisdiction.

Mr. Vanaskie you have relied on our Order denying panel rehearing, have you not?

MR. VANASKIE: Yes, sir.

THE COURT: Isn't it a fact, at the time that motion was before us, pregnant as it was with the self same issues that we

have here, because the — as I recall, the new assignment [27] was disclosed, at that point you already made a new assignment, hadn't you, by that time?

MR. VANASKIE: The assignment had been made in April of 1989, sir. The assignment was made before oral argument was conducted by this Court.

THE COURT: I'm talking about the new assignment.

MR. VANASKIE: No, that was the only assignment done, sir. That was done in April of 1989.

THE COURT: In all events, when we set the petition for panel rehearing before us, we had no way of knowing whether Judge Muir would set the whole — would find collusion and set the whole thing aside, isn't that right?

MR. VANASKIE: You certainly did not know he would find collusion.

THE COURT: For all we knew, Judge Muir would find there was collusion based upon a hearing, and fact finding; set the whole thing aside and all of these other issues would be beside the point, isn't that right?

MR. VANASKIE: That is correct. You [28] also had no way of of knowing he would conduct a hearing on collusion, since your remand instructions gave him the option of either confirming the sale to Linde or conducting a hearing on the issue of collusion.

THE COURT: Why should significance be attributed to our ruling, at a time when it remained possible that our ruling would

be mooted?

MR. VANASKIE: I don't think any precedential significance can be given to that ruling.

We cannot know what was the thought process in terms of what motivated the denial.

What we can say, is that we raised the issue that is before the Court now at that time.

THE COURT: Mr. Vanaskie, why shouldn't we simply hold on to this case, wait for Judge Muir to decide it, retain jurisdiction, direct the Clerk that if and when a new appeal is filed, that it should come back to this panel, why isn't that the most sensible way of dealing with this case?

MR. VANASKIE: The answer, your Honor, is that the question of whether or not the failure to appeal precludes them from obtaining relief, I [29] think is the threshold issue that must be resolved, that issue won't change, that issue could promote judicial economy by obviating the need for further proceedings in the District Court.

I do recognize that the District Court could rule there was indeed a condition precedent that was not fulfilled. And, that issue may not have to be addressed either way.

THE COURT: The District Court could hold a hearing, make fact findings and moot that issue. You want to talk about judicial economy, it is entirely possible that if some of these other issues are explored, that would be the end of it, at least it would come back on a different issue.

MR. VANASKIE: It would come back in a different context, but that issue will still be here. That issue is not going to go away depending upon —

THE COURT; But, I think this panel would agree, I don't think we want to stick any of our colleagues with this case, after all of this time, so we would hold on to it.

[30] In other words, you and Mr. Whelley agree that if we would decide that, limited to that issue, and then retain it or send it back or what have you, that then Judge Muir could proceed?

MR. VANASKIE: Yes, sir.

THE COURT: Could Judge Muir proceed in the alternative, you know, anticipating both rulings, and make all nacessary fact findings and legal rulings to enable us to decide the case either way?

MR. VANASKIE: I see no impediment to Judge Muir's proceeding in that fashion.

THE COURT: He could do that?

MR. VANASKIE: I spay we have presented this issue to the Court —

THE COURT: When I was a District Judge, I remember I had a case I didn't know what the Court of Appeals was going to do, I submitted the case, I told the jury, now, I want you to answer questions A, B and C. I know it is inconsistent, but this is a tricky legal issue and the Court of Appeals may think I am wrong. What want you to do, assuming I am wrong, answer questions D, E and F and they did; that was the end. [31] It was

protected either way. That could be done here, couldn't it?

MR. VANASKIE: Yes, sir. I'm not saying it couldn't be done.

THE COURT: We can't make Judge Muir do it, I suppose, if we simply stay it, it is up to him whether to do it.

MR. VANASKIE: Your Honor, I suppose you are right.

I don't see any reason why Judge Muir wouldn't go ahead and decide the summary judgment motion on the issues before him.

I would say that with respect to the return of the $200,000 and any waiver that's asserted there, we did not raise that issue in our answer because it was not asserted as a basis for relief in the complaint.

I think it is an non-issue in the case.

THE COURT: Isn't it true, that even assuming that Carrier should have appealed, should and could have appealed, that there are exceptions to the — it's not jurisdictional, basically precedential and there are exceptions to the — well, there are grounds to excuse cross appeal, isn't that right? Mr. Whelley has cited that.

MR. VANASKIE: There are precedents that have held that it's a rule of practice, as opposed to a jurisdictional rule, I think those precedents are called into question by the analysis set forth in Torres.

If it was a rule of practice, that was not an inadvertent clerical error excused in that case, instead the Supreme Court went to

great lengths to say it was jurisdictional.

THE COURT: Assuming that it is a rule, assuming we understand your position, and we may have to confront it, assuming that it is a rule of practice, why isn't the failure of Carrier to cross appeal excuseable under the circumstances?

MR. VANASKIE: Because the exceptional circumstances, you see where it has been recognized or not present here.

In Barnett, the mother who had not appealed, had every reason to believe that the appeal was taken to protect her interests.

Indeed, the brief was signed by the attorney on behalf of the assignor and the [33] assignee.

In this case, Carrier had no reason to believe that we took the appeal to protect its interests. We did not.

THE COURT: When you had counsel with you.

MR. VANASKIE: We did not act as its surrogate. He sat at counsel table, they filed on their own a brief in support of the appeal which adopted in total our brief.

Throughout our brief, your Honors, we argued that the consequence of disapproval of the assignment did not mean a second judicial sale, instead it meant confirm the sale to Linde.

I understand your Honor's displeasure at the fact that Mr. Speilman got up here, but the point is, we did not mislead them into believing that at any point in time our position was other than as we have expressed it today and as we expressed it to the

Court in October of 1989.

No, sir, I do not believe that I mislead the Court. I do not believe so.

THE COURT: Well, let me tell you, counsel, the next time that you have someone who [34] appears at your table, and who is adopting, who argues for adopting your position, I'm assuming the two of you are in tandem, when they have no right at all to even argue.

MR. VANASKIE: Thank you, your Honor.

Are there any other questions?

Yes, sir.

THE COURT: I have a couple of other questions.

If they had filed an appeal, what difference would it have made?

MR. VANASKIE: The difference it would have made, number one, signalling their intent to abide by the assignment and comply with the conditions imposed upon them to obtain District Court approval of the assignment.

THE COURT: They can file an appeal.

If they had filed an appeal, this Court's decree, I submit to you, would not have been any different because it would have had to remand to Judge Muir to decide whether there was collusion or fraud.

So, the fact that they were not in this appeal, makes no difference because our remand was [35] on the issue as to whether Judge Muir was in error on precluding this assignment without a factual predicate or conclusion of fraud to summarize.

Please explain to me, what would have been the difference, and if they had appealed as a matter of law on the issue of collusion or fraud?

MR. VANASKIE: In terms of the ultimate outcome of the case, I do not believe that their appeal would have had made any difference.

As a practical matter —

THE COURT: All right. Now in Torres, some of these other cases, it does make a difference.

I mean, here we have a case, where even if their appeal had been taken, I can't see where one sentence of Judge Nygaard's superb opinion would have been changed.

Can you tell me what in his opinion, would have been changed if an appeal had been taken?

MR. VANASKIE: I do not believe the analysis would have changed. I do not believe that a sentence would necessarily have to be changed as a result of the fact that they took an [36] appeal.

However, the situation, I submit is not any different than Torres because there you have 16 plaintiffs, one plaintiff doesn't appeal, the other 15 plaintiffs get their complaint reinstated and that plaintiff, the non-appealing plaintiff is out of Court; there

would be no difference in the analysis undertaken by the Court in that instance other than to recognize the failure to appeal an Order that is adverse to you has consequences.

I also would submit to the Court that as a practical matter, there was a difference in the failure to appeal, and that is as follows: That is that Mr. Linde bears the burden and the expense of the appeal. More importantly, he bore some risks in connection with the appeal. The risk of being held accountable for costs if he did not prevail and also the fact that Judge Muir had indicated that the matter was subject to additional litigation against Mr. Linde.

THE COURT: Okay. Would you be satisfied if we said that any costs which were incurred should be shared by the parties, if that is important, if that is some type of equitable [37] argument. I'll ask counsel for the appellant, is he willing to state that he would share that cost, if that is what you are complaining about.

MR. VANASKIE: I'm not complaining at all about that.

THE COURT: Why did you raise it?

MR. VANASKIE: I'm suggesting that there was a practical difference resulting from the failure of them to appeal.

I do not suggest there was any difference in the Court's analysis but you cannot sit by on the sidelines and then be a cheerleader and then hope to recover. I don't believe the rules permit for that.

Are there any other questions?

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THE COURT: We have your position, Mr. Vanaskie.

MR. VANASKIE: Thank you.

MR. WHELLEY: I did not reserve any time for rebuttal, your Honors, with the possibility that this Court may consider my argument and decide the whole case on the merits. Would the Court consider leave for us to file as a supplemental appendix the state of the record in [38] the companion specific performance case through the motion for summary judgment and undisputed fact statement?

THE COURT: You would have no objection to that, would you?

MR. VANASKIE: No, sir.

MR. WHELLEY: And, I would I have no objection, if Mr. Vanaskie would like to have added his —

THE COURT: Why don't you do that, file a joint supplemental appendix. I think that would be helpful.

MR. VANASKIE: Thank you very much.

THE COURT: The panel directs counsel to arrange with the Clerk of Court for a transcript of this oral argument.

There are a lot of positions and representations were made which may be useful to us in disposing of it. And, therefore, the Clerk, upon your request will arrange with a Court Reporter to listen to the tape and transcribe your remarks for our use.

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We will take a five minute recess.

(Whereupon the hearing was adjourned)